(11)

No. 06-5754
Title: Victor A. Rita, Petitioner
v.
United States
Docketed: August 9, 2006
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (05-4674)
Decision Date: May 1, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 28 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 8, 2006)
Aug 17 2006	Memorandum of respondent United States filed.
Aug 31 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 1 2006	Reply of petitioner Victor A. Rita filed. (Distributed)
Sep 18 2006	DISTRIBUTED for Conference of September 25, 2006.
Oct 11 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 30 2006	DISTRIBUTED for Conference of November 3, 2006.
Nov 3 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following Questions: 1) Was the district court's choice of within-Guidelines sentence reasonable? 2) In making that determination, is it consistent with United States v. Booker, 543 U. S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences? 3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. Sec. 3553(a) factors and any other factors that might justify a lesser sentence?.
Dec 6 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Dec 18 2006	SET FOR ARGUMENT ON Tuesday, February 20, 2007.
Dec 18 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
Dec 18 2006	Motion to file Volume II of the joint appendix under seal. filed by petitioner Victor A. Rita.
Dec 18 2006	Brief amicus curiae of Families Against Mandatory Minimums filed. VIDED.
Dec 18 2006	Brief amicus curiae of New York Council of Defense Lawyers filed.
Dec 18 2006	Brief of petitioner Victor A. Rita filed.
Dec 18 2006	Joint appendix Volume I filed.
Dec 18 2006	Brief amici curiae of National Veterans Legal Services Program, et al. filed.
Dec 18 2006	Brief amici curiae of Law Professors Who Study Sentencing Reform filed. VIDED.
Dec 18 2006	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
Dec 18 2006	Brief amici curiae of Federal Public and Community Defenders, et al. filed. VIDED.
Dec 18 2006	Brief amici curiae of Marc Miller, et al. filed.
Dec 20 2006	Motion DISTRIBUTED for Conference of January 5, 2007.
Jan 5 2007	Supplemental Volume to the joint appendix filed.
Jan 8 2007	Motion to file Volume II of the joint appendix under seal. GRANTED.

Jan 8 2007	Record received from U.S.C.A. for 4th Circuit. (1 envelope).
Jan 10 2007	CIRCULATED.
Jan 10 2007	Record received from U.S.D.C. for Western District of North Carolina. (1 envelope) A portion of this record is sealed.
Jan 22 2007	Brief amicus curiae of United States Sentencing Commission filed. VIDED. (Distributed)
Jan 22 2007	Brief of respondent United States filed. (Distributed)
Feb 9 2007	Reply of petitioner Victor A. Rita filed. (Distributed)
Feb 20 2007	Argued. For petitioner: Thomas N. Cochran, Assistant Federal Public Defender, Greensboro, N.C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

06 5754

NO.

FILED
JUL 28 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO PROCEED IN *FORMA PAUPERIS*

The Petitioner, through his undersigned counsel, requests leave to proceed in *forma pauperis* in this Court pursuant to Rule 39 of the Supreme Court Rules and 18 U.S.C. § 3006A(d)(6). Petitioner was appointed counsel by the United States Court of Appeals for the Fourth Circuit pursuant to the Criminal Justice Act of 1964. No affidavit is attached inasmuch as the above-referenced court below appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted, this 28th day of July, 2006.

THOMAS N. COCHRAN
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Telephone: (336) 333-5455

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IN THE

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Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS N. COCHRAN
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QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals appellate review for "unreasonableness" has preserved *de facto* mandatory Guidelines, contrary this Court's ruling in United States v. Booker, 125 S. Ct. 738 (2005), by discouraging district courts from sentencing outside of the recommended guidelines ranges?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR A. RITA, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on May 1, 2006.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is United States v. Rita, No. 05-4674, 2006 WL 1144508 (4th Cir. May 1, 2006) (unpublished) (Appendix A). The district court judgment sought to be reversed is United States v. Rita, No. 3:04-CR-00105-6 (WDNC July 1, 2005) (Appendix B).

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on May 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

On April 28, 2004, the Petitioner/Defendant, Victor A. Rita, Jr., (hereinafter "Defendant" or "Rita") was charged in a five-count indictment. Counts One and Three charged the Defendant with giving false testimony to a grand jury in violation of 18 U.S.C. § 1623(a). Counts Two and Four charged the Defendant with making a false statement in violation of 18 U.S.C. § 1000(a)(2). Count Five charged the defendant with obstructing justice in violation of 18 U.S.C. § 1503. The Defendant appeared for arraignment on July 12, 2004, and entered a plea of not guilty to each count in the indictment. The Defendant proceeded to trial before a jury on November 8, 2004. At the close of the Government's evidence, the Defendant moved for an acquittal on Rule 29 grounds. The court denied the motion. On November 9, 2004, the jury returned a verdict of guilty on each of the five counts.

After the preparation of a presentence report (PSR), the Defendant filed a motion for a downward departure. The Defendant appeared for sentencing on June 7, 2005. The court imposed a sentence, within the recommended guideline range, of 33 months imprisonment on all counts to run concurrently, a term of supervised release of three years on each count to run concurrently, and a $500 special assessment. A judgment incorporating that sentence was filed on July 1, 2005, and an

amended judgment was filed on August 30, 2005. The judgment was amended to remove the date the Defendant was to report to the Federal Bureau of Prisons. The Defendant filed a premature, but timely *pro se* Notice of Appeal on June 17, 2005. The Fourth Circuit affirmed the district court's ruling in an unpublished opinion on May 1, 2006.

II. FACTUAL BACKGROUND

From March 2002 to February 2004, a Grand Jury of the United States in the Western District of North Carolina, along with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) conducted an investigation of InterOrdnance of America, Inc.'s sales of PPSh-41 machine gun parts kits. In January 2003, the Defendant bought two firearms parts kits from InterOrdnance, one of which was a PPSh-41 machine gun parts kit and the other was a RPK parts kit. On September 4, 2003, at 8:26 a.m., ATF Special Agent Bonnie Levin spoke to the Defendant on the telephone regarding returning a parts kit the Defendant purchased from InterOrdnance. He agreed to surrender the parts kit to her the following week.

A telephone call was placed from the Defendant's residence to InterOrdnance on September 4, 2003, at 10:05 a.m. The call lasted about four minutes. The Defendant stipulated that his wife and his son would testify that they did not place the call. On September 6, 2003, the Defendant shipped the PPSh-41 parts kit back to InterOrdnance. On or about September 10, 2003, the Defendant

voluntarily delivered an RPK parts kit to his attorney for surrender to Agent Levin. No letter was sent by the ATF to the Defendant requesting that he surrender his PPSh-41 parts kit to the ATF.

On October 27, 2003, the Defendant was called to testify before the Grand Jury. At that time, the Assistant U.S. Attorney (AUSA) conducting the grand jury investigation believed that the Defendant had assembled his PPSh-41 parts kit into fully functioning condition. In addition, the AUSA was aware of a report that InterOrdnance personnel, during a telephone call, had attempted to discourage another individual, David Lawson, from cooperating with the ATF in its effort to recover the PPSh-41 parts kit that Mr. Lawson had purchased from Interordnance. At the grand jury proceedings, the Defendant gave answers contrary to his literal actions. Those answers provided the basis for the charges of false testimony and obstruction of justice. Though technically inaccurate, the Defendant still believes the contextual sincerity of his answers was responsive to the questions posed. The jury concluded otherwise at trial.

III. FOURTH CIRCUIT OPINION

In an unpublished, *per curiam* opinion, the Fourth Circuit affirmed the Defendant's conviction and sentence. In its one-page analysis, the court stated "'while we believe that the appropriate circumstances for imposing a sentence outside the guideline range

will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range.' United States v. White, 405 F.3d 208, 219 (4th Cir.), cert. denied, 126 S. Ct. 668 (2005). Indeed, 'a sentence imposed within the properly calculated Guidelines range is presumptively reasonable.'" United States v. Rita, No. 05-4674, 2006 WL 1144508 at *1 (4th Cir. May 1, 2006) (per curiam) (unpublished) (citing United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)). The court found "that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory." Id. at *1. The court concluded that the within-guideline sentence was reasonable.

REASONS FOR GRANTING THE WRIT

In United States v. Booker, 125 S. Ct. 738 (2005), this Court proclaimed that, pursuant to Blakely v. Washington, 542 U.S. 296 (2004), the federal sentencing guidelines were unconstitutionally applied and that the proper remedy was to make them advisory rather than mandatory. 125 S. Ct. at 756-57. The Court in Booker also ordered sentencing courts to consider evidence relating to all the factors set forth in 18 U.S.C. § 3553(a). Id. at 764-65. In addition to the § 3553(a) factors, the courts must also consider the guidelines in determining a reasonable sentence. Id. at 764.

The circuit courts of appeals have split on the important issue of whether a sentence within the guideline range is presumptively reasonable. The First, Second, Third, and Ninth circuits have declined to find a sentence within the guideline range to be presumptively reasonable.[1] See United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*) ("We do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable,'"); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) ("declining to establish any presumption, rebuttable or otherwise,

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[1]The Eleventh Circuit stated that a sentence within the guideline range is not "per se" reasonable in United States v. Talley, 431 F.3d 784, 787 (11th Cir. 2005); however, only in unpublished cases has the court extended that statement to say that a sentence within the guideline range is not "presumptively reasonable." See e.g., United States v. Plata-Mora, 173 Fed. Appx. 812, 812 (11th Cir. 2006) (unpublished).

that a Guidelines sentence is reasonable"); United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006) (finding it unnecessary "to adopt a rebuttable presumption of reasonableness for within-guidelines sentences"); and United States v. Carty, --- F.3d ---, 2006 WL 1975895 (9th Cir. July 17, 2006) ("Although several circuits have afforded a presumption of reasonableness to within-the-Guidelines sentences, ... we have not adopted this position"). The reasoning is that making the guidelines presumptively reasonable comes too close to making them mandatory, contrary to the ruling in Booker. See Jimenez-Beltre, 440 F.3d at 518 ("Although making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear"); and Fernandez, 443 F.3d at 27 (same, quoting Jimenez-Beltre, 440 F.3d at 518).

On the other hand, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits have found a sentence within the advisory guideline range to be presumptively reasonable. See United States v. Green, 436 F.3d 449, 457 (4th Cir.) (a sentence imposed within the properly calculated Guidelines range is presumptively reasonable), cert. denied, 126 S. Ct. 2309 (2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively

reasonable"); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006) ("We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness"); United States v. Lewis, 436 F.3d 939, 946 (8th Cir. 2006) ("A sentence falling within the applicable guideline range is presumptively reasonable"); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) ("we join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"); United States v. Dorsely, --- F.3d ---, 2006 WL 2034245 at *7 (D.C. Cir. July, 21 2006) ("We agree with our sister circuits that a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness"); and United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) ("any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"). However, as illustrated below, the better view is that the guidelines are not, and should not be construed to be, presumptively reasonable.

Justice Scalia asked in Booker, "Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?" 543 U.S. at 313 (Scalia, J., dissenting.) The answer in the Fourth Circuit, and six other circuits, is "yes." The district

courts in the Fourth Circuit are commanded into following the "suggested" guideline range because the Fourth Circuit has found the guidelines presumptively reasonable and has overwhelmingly vacated and remanded cases where the sentence imposed was outside the suggested guideline range. Moreover, the inappropriate weight given to the guidelines was made abundantly clear by the Fourth Circuit in United States v. Moreland, 437 F.3d 424 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006). "[W]hen the variance[2] is a substantial one, ... we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." Id. at 434. Such language likens unto the standard for departures under the guidelines, which were available before Booker, but which this Court did not find sufficient to save the guidelines from being unconstitutionally applied. See 543 U.S. at 234.

In Moreland, the lower court had imposed a sentence of ten years imprisonment, which was a two-thirds reduction from the bottom of the advisory guideline range. Id. at 427. The suggested guideline range was that of a career offender, 360 months to life in prison. Id. at 434. After considering the factors in 18 U.S.C. § 3553(a), the court justified the sentence of ten years based on

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[2]The Fourth Circuit refers to any sentence not within the advisory guideline range as a "variance sentence." Moreland, 437 F.3d at 432.

the nature and circumstances of the offense; it involved "a relatively small amount of cocaine base, was nonviolent, and did not involve a firearm." Id. at 435. In addition, neither of the defendant's prior offenses involved violence or firearms. The court believed that the defendant "ha[d] the ability and potential to become a productive member of society" based on his education and work history. Finally, the sentencing court believed that, compared with other career offenders, this defendant's current and past offenses were unlike the type and pattern of offenses seen in other career offenders. Id.

The Fourth Circuit found that the lower court committed clear error by the extent of its variance from the suggested guideline sentence. The court vacated the sentence and remanded for resentencing. Skeptical that the district court on remand would exercise its sentencing discretion appropriately, the Fourth Circuit engaged in appellate sentencing with a directive *that any sentence imposed be no less than twenty years imprisonment.* Id. at 437.

Likewise, in United States v. Hampton, 441 F.3d 284 (4th Cir. 2006), the court vacated and remanded for resentencing a case where the lower court imposed a sentence of probation rather than one within the 57 to 71 month suggested guideline range. "The [lower] court reasoned that because the offense caused no injury and because Hampton was employed and was caring for his two youngest

children, a sentence of no incarceration, but only probation, would adequately deter Hampton and others from violating the law and would adequately protect the public from Hampton." Id. at 288. The Fourth Circuit noted in the same sentence, as though it were one thought, that Hampton would not have been entitled to a downward departure under the guidelines and there was no basis for a reduction of near that magnitude in the record. Id. at 289. Notably, the court left for another day whether it would allow a variance based on a factor discouraged as a basis for departure under the guidelines Id., although its vacateur of Hampton's sentence effected that very principle.

Most recently, in United States v. Davenport, 445 F.3d 366 (4th Cir. 2006), the court vacated and remanded because the lower court gave a sentence more than three times the top of the advisory range. The appellate court found that sentence unreasonable and not supported by compelling reasons. Id. at 372.

In case after case, the Fourth Circuit has found reason to vacate and remand cases that imposed variances from the guideline range.[3] In United States v. Clark, 434 F.3d 684 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006), the court vacated and remanded because the lower court considered sentencing disparities between

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[3]In an unpublished case, United States v. Moreno-Mendoza, No. 05-4428, 2006 WL 1023848 (4th Cir. April 19, 2006), the Fourth Circuit vacated and remanded a sentence of 41 months imprisonment where the suggested guideline range was 15-21 months.

state and federal defendants to determine that a variance below the guidelines was reasonable. In United States v. Green, 436 F.3d 449 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006), the court vacated and remanded because the lower court determined that the career offender status overrepresented the defendant's criminal history. In United States v. Eura, 440 F.3d 625 (4th Cir. 2006), the court vacated and remanded because the lower court considered the sentencing disparity between crack and powder cocaine to determine that a variance below the guidelines was reasonable. In United States v. Perez-Pena, No. 05-5054, 2006 WL 1791697 (4th Cir. June 30, 2006), the court vacated and remanded because the lower court considered disparities between defendants receiving fast-track departures and those who did not, as well as the circumstances of that defendant justified a variance below the guidelines.

No published case and only one unpublished case, United States v. Woods, 169 Fed. Appx. 790 (4th Cir. 2006), has been identified by counsel where a variance from a properly calculated guideline range was upheld by the Fourth Circuit. In addition, no case has been identified by counsel where the Fourth Circuit found that a sentence within the guideline range was unreasonable. The impact of this precedent is to effectively make mandatory the "advisory" guideline range.

Putting greater emphasis on the guidelines is inconsistent with the structure of 18 U.S.C. § 3553(a). Admittedly, section

3553(a), while giving guidance to the judiciary, is a poorly drafted statute. Its purpose, however, is not difficult to understand. The introductory paragraph states:

> (a) **Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

The poor draftsmanship is apparent from the internally inconsistent treatment of §3553(a)(2). On the one hand, the paragraph directs sentencing courts to impose a sentence that complies with the purposes set forth in subsection (2), while on the other hand thereafter lists the subdivisions of subsection (2) as factors to be considered. Subsection (2) cannot operate simultaneously as both a "purpose" of sentencing and as a "factor" to be considered in fulfilling that purpose. Because section 3553(a) instructs courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing, the factors a sentencing court should consider are those set forth in subsections 3553(a)(1); (a)(3); (a)(4); (a)(5); (a)(6); and (a)(7).

Section 3553(a)(4) lists the advisory guideline range as one of the factors a court is to consider along with the five other factors in § 3553(a). Congress gave no single factor greater weight than any other. Thus, the circuit courts of appeals that have mandated that a sentence within the guideline range is

presumptively reasonable have misconstrued § 3553(a) by placing greater emphasis on one factor above all the others.

The Defendant contends that, due to the consistent Fourth Circuit rulings to sentence within the guideline range, the district courts in general, and the specific one in this case below, did not properly consider and give adequate weight to all the factors in 18 U.S.C. § 3553(a). As a result, the court imposed an unreasonable 33 month sentence which is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a)(2).

The Defendant presented evidence relating to subsections 3553(a)(1), (a)(3), and (a)(6) that advocated imposing a lower sentence than that suggested by the sentencing guidelines. The Defendant presented compelling reasons that support a lower sentence.

The Defendant gave 24 years of commendable military service to the Marine Corps. He served in both the Vietnam conflict and the first Gulf War. During that time, he earned over 35 military awards and metals, some of which were awarded multiple times for different actions. Courts have recognized that even under the mandatory regime commendable military service warrants a shorter sentence. See United States v. McCaleb, 908 F.2d 176, 179 (7th Cir. 1990); United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990); and United States v. Pipich, 688 F. Supp. 191, 193 (D. Md.

1988). In fact, many of the Defendant's health problems, discussed below, stem from his exposure to Agent Orange in the Vietnam War and an injury incurred during his military service in the first Gulf War. Thus, the Defendant's distinguished military service to his country, including hazardous duty in two war zones, should mitigate in favor of a significantly shorter prison sentence.

The Defendant should receive a shorter sentence because he is likely to be a target in prison due to his civilian governmental service. The Defendant worked as an Immigration Asylum Officer with the U.S. Immigration and Naturalization Service from January 20, 1995 to February 28, 2003. From March 1, 2003 to November 30, 2003, the Defendant worked as an investigator for the Department of Homeland Security. In November 2003, the Defendant retired with more than 32 years of service to the federal government.

His duties with the federal government involved testifying for the government in numerous criminal and immigration matters, which resulted in criminal convictions. Due to those convictions, he has been threatened both directly and indirectly. As a result, the Defendant may have to spend most of his prison time in segregation. In Koon v. United States, 518 U.S. 81, 112 (1996), this Court recognized that a law enforcement officer's susceptibility to abuse in prison was a proper sentencing consideration and a proper basis for a downward departure from the guideline sentence. Likewise, the Defendant's assistance in obtaining convictions makes him

vulnerable to abuse in prison and rightly is the basis for a lower sentence.

One "purpose" of sentencing directs the district courts to consider whether the sentence "protect[s] the public from further crimes of the defendant." Section 3553(a)(2)(C). In this case, the Defendant is out on bond pending the outcome of his appeals. Thus, the district court necessarily determined that the Defendant does not pose a threat to the public. The fact the Defendant does not pose a threat to the public also mitigates strongly in favor of a reduced sentence.

Finally, the Defendant is 57 years old and suffers from numerous significant health problems, many related to his military service. Another "purpose" of sentencing is for the district courts to weigh the cost-effectiveness and the ability of the correctional institution to provide the Defendant with the medical care he needs. Section 3553(a)(2)(D).

As stated in the presentence report and accepted by the court:

> Victor Rita reports he is in poor physical health. His medical records are voluminous. He suffers from Type II Diabetes Mellitus and experiences periodic numbness in both feet, as well as problems with memory retention and eyesight. Furthermore, his right foot suffered severe trauma after being crushed by a tractor-trailer while serving in the military in Saudi Arabia. The defendant also has an enlarged prostate, acid reflux, and skin rashes and infections on his legs and neck. Mr. Rita notes that the skin rashes and infections are a result of his exposure to Agent Orange while serving in the U.S. Marine Corp[s]. He also suffers from . . . a herniated disk in his lower back, hyperlipidaemia (excess lipids in blood), and arthritis in his neck. The defendant has

> also been diagnosed with sleep apnea, which requires nightly use of a CPAP breathing machine. As a result of these health issues, he currently takes the following medications daily: Glyburide, Simvastatin, Lisinopril, Omeprazole, Terazosin, Metformin hydrochloride, Lovastatin, Sildenafil, Gemfibrozil, Senofibrate, Fenofibrate, and Alprostadil. He also applies the following medications to his skin rashes/infections: Fluocinonide Topical, Erthromycin Topical, and Flurandrenolide Topical.

As noted by the district court, not many people suffer from Agent Orange. In light of the effects of Agent Orange, rarely seen, and thus, rarely treated in the prison system, his need for a nightly breathing machine, and the many daily medications necessary to treat his various ailments, "a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." USSG § 5H1.1 (policy statement). The Bureau of Prisons simply cannot provide the extent and efficiency of quality care that he has been receiving through the Veterans Administration.

As a veteran of two wars, Mr. Rita is entitled to better medical care than that provided in a prison setting. "Supporting our troops," even those whose mistakes have resulted in a criminal conviction, deserves more than references to bumper stickers. One true way to support the men and women who protect our country by going to war and suffering injuries and illness as a result of that service, is to take that service into real consideration if later in life they make a mistake. Mr. Rita's mistakes were not violent and are not likely to be repeated. He is 57 years old and suffers

daily as a result of serving in those two wars. Time in prison will simply aggravate his health problems because of the decrease in the quality of care.

As a society, we are indebted to Mr. Rita for his service to our country, both in and out of the military. One way to repay that debt is to balance his 32 years of commendable service and the resulting health affects against the nature of his crimes. The scales weigh heavily in his favor. Considering this man's history and circumstances and the limited and non-violent nature of his crimes, he simply does not deserve to spend nearly three years in prison. At the very least, he deserves to be sentenced under a system that does not make the federal sentencing guidelines presumptively reasonable and *de facto* mandatory.

Due to the importance of this question and the split among the circuit courts of appeals, the Defendant asks that this Court grant certiorari and hold that it is error to find that a sentence within the advisory guideline range is presumptively reasonable. Such a standard makes the guidelines, in reality, mandatory, and consequently, unconstitutional pursuant to Booker. The Defendant asks that his case be remanded for resentencing under a system where the guidelines are truly advisory, and thus, constitutional.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 28th day of July, 2006.

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Telephone: (336) 333-5455

APPENDIX

United States v. Rita, No. 05-4674
(4th Cir. May 1, 2006) (unpub. decision) . . . . . Tab A

United States v. Rita, No. 3:04CR105,
(W.D.N.C. July 1, 2005) (judgment) . . . . . Tab B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4674

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

VICTOR A. RITA, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. William L. Osteen, District Judge. (CR-04-105)

Submitted: April 27, 2006 Decided: May 1, 2006

Before NIEMEYER and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Thomas N. Cochran, Assistant Federal Public Defender, Greensboro, North Carolina, for Appellant. Gretchen C. F. Shappert, United States Attorney, Matthew Martens, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Victor A. Rita appeals his jury conviction and sentence on charges of perjury, obstruction of justice and making false statements, in violation of 18 U.S.C. §§ 1623(a), 1001(a)(2), and 1503 (2000), respectively. Rita's sole issue on appeal is whether the sentence imposed by the district court was reasonable. Finding no reversible error, we affirm.

After the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), a sentencing court is no longer bound by the range prescribed by the sentencing guidelines. See United States v. Hughes, 401 F.3d 540, 546-47 (4th Cir. 2005) (noting after Booker, sentencing courts should determine the sentencing range under the guidelines, consider the other factors under § 3553(a), and impose a reasonable sentence within the statutory maximum). However, in determining a sentence post-Booker, sentencing courts are still required to calculate and consider the guideline range prescribed thereby as well as the factors set forth in 18 U.S.C. § 3553(a) (2000). Id. We will affirm a post-Booker sentence if it is both reasonable and within the statutorily prescribed range. Id. at 546-47. We have further stated that "while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range."

United States v. White, 405 F.3d 208, 219 (4th Cir.), cert. denied, 126 S. Ct. 668 (2005). Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (citing United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005), cert. denied, 2006 WL 271816 (2006)).

We find that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. The court sentenced Rita only after considering the factors set forth in § 3553(a). Based on these factors, and because the court sentenced Rita within the applicable guideline range and the statutory maximum, we find that Rita's sentence of thirty-three months' imprisonment is reasonable.

We therefore affirm Rita's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

V.

VICTOR A. RITA, JR.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:04CR105

USM Number: 19814-058
Denzil H. Forrester
Defendant's Attorney

FILED
CHARLOTTE, N. C.
AUG 30 2005
U. S. DISTRICT COURT
W. DIST. OF N. C.

THE DEFENDANT:

_ Pleaded guilty to count(s) .
_ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

_ The defendant has been found not guilty on count(s) .
_ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 8/15/05

Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: August 30, 2005

Amended to remove report date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.
2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

_ The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district:

_ At ____ On ___.
_ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_ As notified by the United States Marshal.
_ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ _____ To _____

At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 1 - 5: THREE (3) YEARS each count to run concurrently.

___ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3583(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS:

ORIGINAL

Supreme Court, U.S.
FILED
SEP - 1 2006
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(13)

No. 06-5754

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2005

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari To

The United States Court of Appeals

For the Fourth Circuit

REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

Counsel of Record

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ARGUMENT

The Government's one-paragraph response to the Petitioner's original petition does not actually brief its opposition to the granting of certiorari, but rather refers the Court and the Petitioner to the reasons it set forth in briefs it filed in other cases. Thus, as directed, the Petitioner addresses the proxy arguments raised and fully briefed in Guzman-Balbuena v. United States, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006), as cited in the Government's response.[1]

In Guzman-Balbuena, the Government argued that the issue is not appropriate for review because the Fourth Circuit did not apply a presumption of reasonableness in affirming that petitioner's sentence. However, in the instant case the Fourth Circuit did explicitly state "a sentence imposed within the properly calculated Guidelines range is . . . presumptively reasonable." United States v. Rita, No. 05-4674, 2006 WL 1144508 at *1 (4th Cir. May 1, 2006) (per curiam) (unpublished) (citing United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (ellipsis in original)).

Also, in its Guzman-Balbuena response, the Government cites to cases where some circuit courts of appeals that have held that a sentence within the guideline range is presumptively reasonable

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[1]Petitioner notes that although the briefs cited by the Government have Westlaw citations, the contract that the Federal Public Defenders Office has with Westlaw does not allow access to that type of material, nor are they available on the Supreme Court's webpage. Thus, with the filing deadline in mind, counsel for Petitioner had to obtain a copy of the Government's brief directly from the Federal Public Defender's Office for the Eastern District of Virginia. The Government might consider in the future attaching a copy of the cited briefs to its memorandum for the convenience of the Court and opposing counsel.

because the Guidelines incorporate the sentencing objectives found in 18 U.S.C. § 3553(a). However, that rationale is simply incorrect. As illustrated below, the guidelines do not incorporate all the sentencing objectives found in § 3553(a). In addition, rules of statutory construction cut against such an interpretation because had Congress believed that the guidelines would incorporate all the factors in § 3553(a), the listing of those factors would be redundant and meaningless when read in conjunction with §§ 3553(a)(4)and (5), which instruct the court to also consider the guidelines when fashioning the appropriate sentence.

As noted above, section 3553(a) sets forth many factors other than the guidelines for determining "a sentence sufficient, but not greater than necessary, to comply with the purposes [of § 3553(a)]." 18 U.S.C. § 3553(a).

The applicable factors are:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a).

Often, a defendant can present evidence relating to a factor that is discouraged or forbidden under the guidelines, but is related to one of the above considerations. For instance, the guidelines *forbid* a court from downwardly departing based on a drug or alcohol dependence or abuse or a gambling addiction (§ 5K1.4), race, sex, national origin, religion, and socio-economic status (§ 5H1.10), lack of guidance as a youth and disadvantaged upbringing (§ 5H1.12), economic hardship (§ 5K2.12), and post-sentencing rehabilitative efforts (§ 5K2.19). Yet, individual circumstances often present instances where such forbidden factors are relevant to sentencing considerations set forth in § 3553(a).

In addition, the guidelines *discourage* courts from considering the defendant's age (§ 5H1.1), education and vocational skills (§ 5H1.2), mental and emotional conditions (§ 5H1.3), physical condition or appearance, including physique (§ 5H1.4) employment record (§ 5H1.5), family ties and responsibilities and community ties (§ 5H1.6), and military, civic, charitable, and public service, including employment-related contributions and prior good works (§ 5H1.11). Many of these forbidden or discouraged factors are ones judges traditionally considered when sentencing a defendant and are not sufficiently taken into account by a "presumptive" guideline range. Thus, the guideline range should not be considered presumptive and allowed to trump the other equally important objectives set forth in § 3553(a).

The Government rejects the Petitioner's argument that making the Guidelines presumptively reasonable leads to an

unconstitutional result. Yet, the Fourth Circuit's post-Booker, law has done just that. Although United States v. Booker, 125 S. Ct. 738 (2005), mandates that the court first calculate the proper guideline range pursuant to existing guideline law and then consider that range, as well as the other factors in 18 U.S.C. § 3553(a), in determining a reasonable sentence, id. at 764, the Fourth Circuit takes it two steps further.

First, as noted above, the Fourth Circuit has held that a sentence within the advisory guideline range is presumptively reasonable. See United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006). By making the guideline range presumptively reasonable, the court places more weight on that factor than any other factor in § 3553(a). Yet, the plain language of § 3553(a) does not support placing a greater weight on the guidelines than any other factor mandated by the statute.

Furthermore, as pointed out by Justice Scalia, section 3553(a) "provides no order of priority among all those factors . . . [and] the statute . . . authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines." Booker, 543 U.S. at 304-05 (Scalia, J., dissenting). "The remedial majority also notes that the Guidelines represent what the Sentencing Commission finds to be better sentencing practices.' True enough, but the Commission's view of what is 'better' is no longer authoritative, and district

judges are free to disagree - as are appellate judges." Id. at 306 n.3 (Scalia, J., dissenting).

Second, the Fourth Circuit stated in United States v. Moreland, 437 F.3d 424 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006), "when the variance[2] is a substantial one, . . . we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." Id. at 434. In Booker, Justice Scalia notes that "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." 125 S. Ct. at 794 (Scalia, J., dissenting). Justice Scalia further advises courts to "[b]ear in mind that one of the most significant features of the remedial majority's scheme of 'unreasonableness' review is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)." Id. (emphasis in original). Yet, as seen in Green, that is precisely the Fourth Circuit's practice.

---

[2]The Fourth Circuit refers to any sentence not within the advisory guideline range as a "variance sentence." Moreland, 437 F.3d at 432. A variance sentence under Moreland, one could argue, is simply a new term for a departure from the guidelines range.

The Fourth Circuit vacates and remands any sentence outside the guideline range that is, in its opinion, inadequately explained. As illustrated in Petitioner's petition for certiorari, that is nearly every single case. Such a practice sends a message to the district courts that they are to sentence within the guideline range.

The standard of review in the Fourth Circuit goes far beyond what is required by Booker. As pointed out by Justice Scalia, "If [the remedial majority] thought that the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed - its opinion would surely say so." 543 U.S. at 305-06 (Scalia, J., dissenting). The Fourth Circuit's justification requirements for sentencing outside the guideline range likens to the standard for departures under the guidelines, which were available before Booker, but which Booker did not find sufficient to save the guidelines from being unconstitutionally applied. See 543 U.S. at 234. Such a system is not "advisory," it is *de facto* mandatory and a simply a return to pre-Booker law.

Chief Judge Merritt of the Sixth Circuit drafted a compelling dissent in United States v. Miller, 910 F.2d 1321, 1330 (6th Cir. 1990), which reflects the Petitioner's constitutional concerns. In Miller, the defendant was charged with and pleaded guilty to conspiring to distribute 1.25 ounces (35.5 grams) of cocaine hydrochloride, yet, he was sentenced for 1,169.5 grams of cocaine. Id. at 1323. Chief Judge Merritt's dissent called attention to the problems in sentencing for unindicted relevant conduct.

Chief Judge Merritt found that process unconstitutional, noting that pursuant to the Fifth and Sixth Amendments, the accused is entitled to "'be informed of the nature and cause of the accusation,' be accorded the right of trial by jury and the rights of confrontation and compulsory process." Id. at 1330 (Merritt, C.J., dissenting). Further, while that defendant waived "some of these important constitutional protections as to the lone count against him, he did not validly waive those rights as to all crimes for which the government might at some time indict him." Id. "[B]y aggregating unindicted, unconvicted crimes with the one crime for which the defendant *was* convicted, the sentence also violates fundamental principles of due process." Id. at 1329 (Merritt, C.J., dissenting).

Chief Judge Merritt points out the heavy emphasis the constitution puts on the right to fair notice of the charges. He states:

> This requirement appears not once, but twice. The Fifth Amendment provides for fair notice by "presentment or indictment." The Sixth Amendment similarly requires that a defendant "be informed of the nature and cause of the accusation." This repetition of the right indicates the significance that the Founders attached to the right to receive fair notice of the crime that a defendant must defend against.

Id. at 1331 (Merritt, C.J., dissenting). Chief Judge Merritt concluded that "[t]he defendant was misled by the charge and the course of the proceedings into believing that his crime was of a smaller magnitude than the Sentencing Guidelines mandate." Id.

As he aptly noted,

> An indictment merely opens the game of defining the crime, which will be played out later in the probation office and the sentencing hearing. The real charge for which the defendant will be sentenced will be drawn up in the probation office, and the sentence will be imposed without the right of confrontation at the sentencing hearing by the court on the basis of hearsay information. Instead of an indictment including all lesser included offenses of the crime charged, the Guidelines say that the sentencing court should include all "greater included offenses" as well.

Id. at 1331-32 (Merritt, C.J., dissenting) (emphasis added). Chief Judge Merritt concluded that "[t]he Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office." Id. at 1332.

Likewise, in United States v. Wilson, 992 F.2d 156 (8th Cir. 1993), the Eighth Circuit addressed a case where a defendant was charged with being a felon in possession and possessing a firearm unregistered to him but was sentenced pursuant to a cross-reference to the assault with intent to commit murder and attempted murder guideline. Senior Circuit Judge Heaney, joined by Senior Circuit Judge Bright, acknowledged in a concurring opinion that based on the law at that time, they were forced to apply the cross-reference. However, in his concurrence, Senior Circuit Judge Heaney stated:

> My dispute is not over whether a preponderance of the evidence supported a finding of attempted first-degree murder, but whether we, or any federal court, should be making any finding in this regard. The attempted murder alleged in this case is not a federal offense. This is not simply a case in which a federal prosecutor chose not to charge an offense, or the offense was charged and the offender acquitted, and then the prosecutor took a second bite of the apple by introducing conduct as relevant to sentencing. Rather, the prosecutor could not even have charged Wilson with the alleged attempted murder. The proper place for this charge is in state court, where

> Wilson would have the right to a jury trial, to confront witnesses, and to have the necessary findings made beyond a reasonable doubt.

Id. at 159 (Heaney, concurring) (emphasis added).

Although Chief Judge Merritt and Senior Circuit Judges Heaney and Bright expressed these opinions prior to the holding in Booker, Booker does not completely address their objections. Merely making the guideline range advisory, yet presumptively reasonable, still allows the Government to circumvent due process procedures by holding a mini-trial on more serious, but uncharged, crimes in a sentencing hearing. If a court finds by a preponderance based on hearsay evidence that a more serious uncharged crime occurred, that court *must* then consider the guideline range for the more serious crime. For that range to be "presumptively reasonable" taints the process to the point that merely saying that it is "advisory" does not save it from being unconstitutional as applied. In other words, a process that advises a court to impose an unconstitutional sentence is an unconstitutional process.

Most recently, Justice Ginsburg indicated how she would rule on presumptive guidelines in a new guise: "In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments." Washington v. Recuenco, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting).

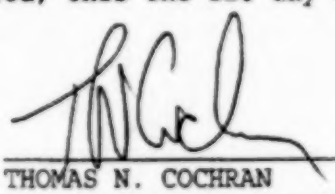
Finally, Petitioner asks that a decision by this Court be held pending the disposition of Cunningham v. California, No. 05-6551,

(cert. granted Feb. 21, 2006). The issue in that case mirrors the issue in the instant case. The issue presented in Cunningham is whether California's presumptive sentencing system violates the Sixth and Fourteenth Amendments. Under the California system, the punishment for Cunningham's offense was 6, 12, or 16 years' imprisonment, with the middle term required absent aggravating or mitigating facts that could be found by the court by a preponderance. Notably, in its Brief in Opposition before the California Supreme Court, the State of California argued that its system did not violate Blakely because it is indistinguishable from the post-Booker federal sentencing system, in that the presumptive middle term is functionally equivalent to the "reasonableness constraint" placed on federal courts by Booker. Brief in Opposition of the State of California at 8-9, 10, 2005 WL 3783460 (filed Dec. 12, 2005). Presumably, the State will present the same argument before this Court. Thus, this case should be held pending the outcome of Cunningham.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

Respectfully submitted, this the 1st day of September, 2006.



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No. 06-5754

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2005

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Thomas N. Cochran, certify that as counsel of record for Petitioner, I have served an original and ten (10) copies of the Petitioner's Reply to the Respondent's Brief in Opposition in the above-entitled case by Overnight delivery to:

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, NE
Washington, DC 20543

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No. 06-5754

Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX: VOLUME I OF II

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CERTIORARI GRANTED NOVEMBER 3, 2006

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
(CHARLOTTE)

[Filed: 04/28/2004]

Case No. 3:04-cr-00105

UNITED STATES OF AMERICA,
Appellant,

v.

VICTOR A. RITA, JR.,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2004	1	INDICTMENT as to Victor A. Rita (1) count(s) 1, 2, 3 (former emp) (Entered: 04/29/2004)
		* * * *
06/01/2004	4	ORDER Setting Conditions of Release as to Victor A. Rita Jr. (Signed by Magistrate Judge Carl Horn III) (mga) (Entered: 06/02/2004)
		* * * *
07/12/200		Arraignment as to Victor A. Rita Jr. held Judge: horn Court Rptr: tob FTR AUSA: Wilson (tob) (Entered: 07/12/2004)
		* * * *
11/08/2004		ORAL ORDER as to Victor A. Rita Jr. denying [25-1] motion for Judgment of Acquittal as to Victor A. Rita (1) (Entered by Judge William L. Osteen) (ssh) (Entered: 11/09/2004)

DATE	NO.	PROCEEDINGS
11/09/2004		Jury trial as to Victor A. Rita Jr. held Judge: Osteen Court Rptr: Kelly (ssh) (Entered: 11/09/2004)
11/09/2004	26	JURY VERDICT as to Victor A. Rita Jr. Guilty: Victor A. Rita (1) count(s) 1, 2, 3, 4, 5 (ssh) (Entered: 01/25/2005)
		* * * *
06/03/2005	27	MOTION for downward Departure by Victor A. Rita, Jr. (Hankins, Susan) (Entered: 06/03/2005)
06/07/2005		Minute Entry for proceedings held before Judge William L. Osteen :Sentencing held on 6/7/2005. Party Victor A. Rita, Jr terminated., Victor A. Rita, Jr terminated. (Court Reporter Jill Simpson w/ Huseby.) (Hankins, Susan) (Entered: 06/09/2005)
		* * * *
06/18/2005	29	NOTICE OF APPEAL by Victor A. Rita, Jr. And request to waive filing fee and appoint counsel. No fee paid. (Barber, Suzanne) (Entered: 06/23/2005)
		* * * *
06/27/2005	32	ADDITIONAL NOTICE OF APPEAL by Victor A. Rita, Jr (Barber, Suzanne) (Entered: 07/06/2005)
		* * * *
07/01/2005	31	JUDGMENT as to Victor A. Rita, Jr. (1), Count(s) 1, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 2, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 3, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 4, 33 mos

DATE	NO.	PROCEEDINGS
		imp + 3 yr SRT + $100 assess; Count(s) 5, 33 mos imp + 3 yr SRT + $100 assess Signed by Judge William L. Osteen on 7/1/05. (Hankins, Susan) (Entered: 07/01/2005)
		* * * *
08/25/2005	37	ORDER as to Victor A. Rita, Jr vacating 36 Order on Motion for Leave to Appeal In Forma Pauperis; the deft's appl. to file a notice of appeal in forma pauperis is GRANTED. Signed by Judge Graham Mullen on 8/25/05. (Koechley, Jeanie) (Entered: 08/26/2005)
08/30/2005	38	JUDGMENT as to Victor A. Rita, Jr. (1), Count(s) 1, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 2, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 3, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 4, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 5, 33 mos imp + 3 yr SRT + $100 assess . Signed by Judge William L. Osteen on 8/30/05. (Hankins, Susan) (Entered: 09/06/2005)
10/07/2005	39	4th Circuit NOTICE as to Victor A. Rita, Jr regarding 4th Circuit appoints federal public defender at Greensboro (MacEwan, Cathy) (Entered: 10/07/2005)
		* * * *
10/24/2005	43	ORDER granting 41 MOTION for Release Pending Appeal filed by Victor A. Rita, Jr. Signed by Judge Graham Mullen on 10/24/05. (MacEwan, Cathy) (Entered: 10/26/2005)

DATE	NO.	PROCEEDINGS
		* * * *
11/28/2005		TRANSCRIPT filed as to Victor A. Rita, Jr for dates of 11/8/04 and 11/9/04—Trial Testimony and Jury Instructions before Judge William Osteen. Court Reporter: Joy Kelly. (MacEwan, Cathy) (Entered: 11/29/2005)
12/09/2005		TRANSCRIPT of Sentencing Proceedings as to Victor A. Rita, Jr held on June 7, 2005 before Judge William L. Osteen. Court Reporter: Jillian Simpson w/Huseby, Inc.. (Anderton, Michelle) (Entered: 12/09/2005)
		* * * *
11/14/2006	54	ORDER granting 53 Motion for Extension of Time to Report to BOP to June 30, 2007 as to Victor A. Rita Jr. (1). Signed by Judge Graham Mullen on 11/14/2006. (jlk) (Entered: 11/14/2006)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 6/28/2005]

Docket No. 05-4674

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

v.

VICTOR A. RITA, JR.,
Defendant—Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/28/05	Criminal case docketed. (rhs)
	* * * *
10/5/05	ORDER FILED [4265496] appointing Federal Public Defender as counsel for Appellant Victor A. Rita. Copies to all parties. ~ [4265496] [05-4674] (rhs)
	* * * *
5/1/06	Unpublished per curiam opinion filed. Copies to all parties. [05-4674] (rhs)
5/1/06	Judgment order filed. Decision: Affirmed. . EOD Date: 5/1/06. ~ [4383690] [05-4674] (rhs)
5/23/06	Mandate issued. ~ [4397198] [05-4674] (dhb)
8/17/06	Supreme Court notice that petition for certiorari was filed on 07/28/06. Spct No.: 06-5754 Spct Pty 1: Victor A. Rita Spct Pty 2: United States. [05-4674] ~ [4445432] (mst)

DATE	PROCEEDINGS
11/13/06	Supreme Court order received granting petition certiorari [4445432-1] on 11/03/06. [05-4674] ~ [4492321] (mst)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed APR 28, 2004]

DOCKET NO. 3: 04 CR 105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.

BILL OF INDICTMENT

Violations:

18 U.S.C. § 1001
18 U.S.C. § 1503
18 U.S.C. § 1623

THE GRAND JURY CHARGES:

At the specified times and at all relevant times:

Introduction

1. From in or about March 2002 through in or about February 2004, a grand jury of the United States in the Western District of North Carolina (hereafter, "the Grand Jury"), in conjunction with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (hereafter, "ATF"), was conducting an investigation into the sale of, among other things, PPSH 41 machinegun "parts kits" by a company (hereafter, "the Company") located in Union County, in the Western District of North Carolina.

2. In or about January of 2003, defendant VICTOR A. RITA, JR. purchased two firearms "parts kits" from the Company, one of which was a PPSH 41 machinegun "parts kit" and the other of which was an RPK "parts kit."

3. In or about April of 2003, ATF began a nationwide recall of the PPSH 41 "parts kits" sold by the Company in furtherance of the investigation of the Company. During the course of this recall, ATF learned that, on at least one occasion, a purchaser of one of the Company's PPSH "parts kits" spoke by telephone to an employee of the Company after receiving notice of the recall and was informed that the purchaser need not surrender the kit to ATF pursuant to the recall.

4. As part of the recall, ATF Special Agent Bonnie Levin (hereafter, "Agent Levin") spoke by telephone to defendant RITA at or about 8:26am on or about September 4, 2003, concerning the surrender of the PPSH "parts kit" that defendant RITA had purchased from the Company. During this telephone conversation, defendant RITA advised that he would surrender his PPSH "parts kit" to Agent Levin at her office in Miami, Florida the following week.

5. At or about 10:05am on or about September 4, 2003, defendant RITA placed an approximately four-minute telephone call to the Company.

6. On or about September 6, 2003, defendant RITA shipped the PPSH "parts kit" back to the Company rather than surrendering it to ATF as he had advised Agent Levin that he would do. Thereafter, defendant RITA delivered his RPK "parts kit" to his attorney for surrender to Agent Levin.

7. On or about September 10, 2003, defendant RITA's attorney contacted Agent Levin to inform her that he was in possession of a "parts kit," and Agent Levin agreed to meet defendant RITA's attorney and take possession of the "parts kit."

8. On or about September 17, 2003, Agent Levin arrived at the office of defendant RITA's attorney expecting to take possession of the PPSH "parts kit" that defendant RITA had agreed to surrender to her. After examining the RPK "parts

kit" that defendant RITA had delivered to his attorney, Agent Levin advised defendant RITA's attorney that the "parts kit" was not, in fact, the PPSH "parts kit."

9. On or about October 8, 2003, a federal grand juiy subpoena was served for defendant RITA, compelling him to appear before the Grand Jury in order to explain the reason that he had returned his PPSH "parts kit" to the Company.

COUNT ONE

10. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 9 of the Indictment, and further alleges that:

11. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

while under oath and testifying in a proceeding before the Grand Jury, knowingly made a false material declaration, that is to say:

12. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether violations of Title 18, United States Code, Section 922(o) had been committed with regard to the PPSH 41 machinegun "parts kit" distributed by the Company, and to identify the persons who had committed, caused the commission of, and conspired to commit such violations. In addition, the Grand Jury was investigating whether the Company had attempted to obstruct said investigation, in violation of Title 18, United States Code, Sections 1503, 1510, and 1512. It was material to said investigation that the Grand Jury ascertain why defendant RITA failed to surrender his PPSH 41 machinegun "parts kit" to ATF agents as requested and instead returned said "parts kit" to the Company.

13. At the time and place alleged, defendant RITA, appearing as a witness under oath at a proceeding before the Grand Jury, knowingly made the following declaration in response to questions with respect to the material matter alleged in paragraph 12 above:

> "Q: Do you have—have you placed any telephone calls to [the Company] since the time you purchased the parts kit in January of 2003?"
> "A: Yes, sir. I already told you I did."
> "Q: Those were the ones where you called them up after you had sent the parts kit back?"
> "A: Correct."
> "Q: Did you have any other conversations with them over the telephone?"
> "A: No, sir."

14. The aforesaid underscored testimony of defendant RITA, as he then and there well knew and believed, was false in that he spoke to agents and employees of the Company by telephone on or about September 4, 2003, prior to shipping the PPSH 41 machinegun "parts kit" back to the Company on or about September 6, 2003.

All in violation of Title 18, United States Code, Section 1623(a).

COUNT TWO

15. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 14 of the Indictment, and further alleges that:

16. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

in a matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States,

knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation as set forth in paragraph 13 above, all in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT THREE

17. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 16 of the Indictment, and further alleges that:

18. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

while under oath and testifying in a proceeding before the Grand Jury, knowingly made a false material declaration, that is to say:

19. At the time and place alleged, defendant RITA, appearing as a witness under oath at a proceeding before the Grand Jury, knowingly made the following declaration in response to questions with respect to the material matter alleged in paragraph 12 above:

"Q: Sir, did you have any discussions with the agent about the PPSH parts kit?"
"A: None at all."
"Q: You're absolutely positive about that as you sit here today?"
"A: Yes. sir."
"Q: Did the agent ever ask you to return the PPSH parts kit?"
"A: No, sir. She asked me to surrender the RPK kit."
"Q: There's no question in your mind about that?"
"A: About surrendering the RPK kit?"
"Q: About which kit she asked you to surrender."
"A: No, sir."

20. The aforesaid underscored testimony of defendant RITA, as he then and there well knew and believed, was false in that Agent Levin, with whom defendant RITA spoke, discussed the PPSH parts kit with him, asked him to surrender the PPSH parts kit, and did not ask him to surrender the RPK parts kit.

All in violation of Title 18, United States Code, Section 1623(a).

COUNT FOUR

21. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 20 of the Indictment, and further alleges that:

22. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

in a matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States, knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation as set forth in paragraph 19 above, all in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT FIVE

23. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 22 of the Indictment, and further alleges that:

24. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due administration of justice by providing and causing to be provided false and misleading information to the Grand Jury, all in violation of Title 18, United States Code, Section 1503.

A TRUE BILL

/s/ Bārbara McBryde
FOREPERSON

ROBERT J. CONRAD, JR.
UNITED STATES ATTORNEY

/s/ Matthew T. Martens
MATTHEW T. MARTENS
ASSISTANT UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:04CR105
NOVEMBER 8 & 9, 2004

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VICTOR A. RITA, JR.,
Defendant.

TRANSCRIPT OF TRIAL TESTIMONY AND JURY INSTRUCTIONS BEFORE THE HONORABLE WILLIAM L. OSTEEN UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES	MATTHEW T. MARTENS, ESQ. U. S. Attorney's Office 227 W. Trade Street Suite 1700 Charlotte, NC 28202
FOR THE DEFENDANT	DENZIL H. FORRESTER, ESQ. P.O. Box 32511 Charlotte, NC 28232

* * * *

[4] (Court called to order and defendant present in courtroom.)

THE COURT: Now we're ready to proceed with our matter here, so you may bring them back in, please.

(Jury enters courtroom at 1:52 p.m.)

THE COURT: Ladies and gentlemen, thank you for your patience. I said there was another matter that may come up at 1:30 that would require some time. We have been able to get that matter worked out, so we could proceed here and now and thank you for being patient with us.

The government may call its first witness.

MR. MARTENS: The United States calls ATF Agent John Schroepfer.

JOHN SCHROEPFER

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARTENS

Q Good afternoon, sir.

A Good afternoon.

Q Could you please introduce yourself to the jury.

A My name is John Schroepfer. I'm with the Bureau of Alcohol, Tobacco and Firearms and Explosives, a special agent.

Q How long have you been a special agent with the Bureau of Alcohol, Tobacco and Firearms?

[5] A I have been working for ATF since September of 2000.

Q And where are you currently stationed?

A I'm currently stationed in Charleston, South Carolina.

Q Do you have any particular area of specialization within ATF?

A No, sir. I'm a special agent, and I specialize in enforcing the gun laws, explosives laws, and the Arms Export Control Act, the import provisions of that.

Q Prior to joining ATF in 2000, what were you doing for employment prior to that?

A I worked as a U. S. Customs officer serving in ports of Detroit, Michigan and Jacksonville, Florida.

Q How long all told have you been a law enforcement officer?

A Approximately 15 years.

Q Is there any type of educational training you needed in order to be a law enforcement officer?

A Yes, sir. Including the basic training that all ATF agents have to go through, such as criminal investigator, basic training courses, ATF National Academy, it's a 13-week resident program which teaches the Gun Control Act, National Firearms Act, and explosives laws as they relate to the laws that ATF has to enforce.

Q I want to direct your attention back to the 2001, 2002, and 2003 time frame and ask if you were involved in an [6] investigation of a company known as Interordnance of America?

A Yes, sir.

Q And how was it you came to be involved in that investigation of Interordnance?

A Yes, sir. The Interordnance of America investigation was a federal grand jury investigation which initiated in September of 2001 down in Charleston, where I'm stationed.

Based on referral from the Customs Service regarding machine gun parts that were imported into the United States, which caused ATF and the U. S. Customs Service to initiate a criminal investigation regarding the practices of Interordnance of America, it's a licensed importer and licensed firearms dealer that's located in Monroe, North Carolina.

Q And when you first got this call, what did you do? When you first got this call from Customs that you referred to?

A Yes, sir. My initial activity was my office received a call from Customs and my supervisor sent me to the port to collect a sample of a parts kit that had been imported. And that particular date was an FNFAL varient, it was a British L1A189 machine gun parts kit, a shipment of them that

had been—1800 I believe was the quantity, that was being shipped into the Port of Charleston.

[7] I went to the port and took a sample of the parts and sent them to our technology branch. And that eventually resulted in an investigation being opened, which caused the U. S. Attorney's Office here in North Carolina to open up a grand jury investigation to further collect evidence to find out what exactly was going on with Interordnance of America and their principal officers and employees.

Q Were there particular firearms that were the subject of your investigation of Interordnance?

A Yes, sir. There was three particular firearms that ATF and the U. S. Customs Service were looking into investigating. And those particular firearms, one was the PPSh-41, which came on later on in the investigation, and the British L1A1, or the FAL varient type, which was the firearm that initiated the beginning of the investigation. And there was another firearm called a Styer MP69. So of the three, there was three different types, but today we're talking, the gun you'll see today is a PPSh-41.

MR. FORRESTER: Objection.

MR. MARTENS: We'll get to that in a second.

THE COURT: Okay. Overruled—I mean sustained.

Do not consider the last part of that answer, ladies and gentlemen.

BY MR. MARTENS

Q At any time did your investigation involve a gun known [8] as an RPK?

A No, sir.

Q Now, you indicated just a moment ago at some point the investigation turned to a PPSh-41. Is that correct?

A Yes, sir.

Q How is the investigation turned to the Russian PPSh-41?

A During the course of our investigation, ATF received a citizen complaint from Nancy Vogel, who is a resident of Maryland. And she received a parts kit she did not order in the mail, which caused an agent to respond to her residence and collect that PPSh-41 parts kit.

And he submitted that to our technology branch for examination. And after examination, the technology branch classified that as a machine gun under federal law which then led to the PPSh parts kit being added to this—already ongoing investigation.

Q Can you tell the jury when was it that the investigation turn to the PPSh-41 parts kit?

A A specific date, I don't remember—

Q Just roughly.

A —a specific date. But it was in 2003.

Q Can you tell the jury what is a PPSh-41 machine gun.

MR. FORRESTER: Objection, Your Honor.

THE COURT: Basis.

MR. FORRESTER: Foundation.

[9] THE COURT: All right. I'll sustain it for that.

BY MR. MARTENS

Q Sir, during your time at ATF, have you become familiar with various firearms?

A Yes, sir.

Q And have you actually seen a PPSh-41?

A Yes, sir, I have.

Q How many PPSh-41s have you seen, roughly?

A PPSh-41s that I've seen assembled, probably 50 to 100. In parts form, thousands.

Q Would you recognize a PPSh-41 if you saw it?

A Yes, sir.

Q And can you tell the jury what a PPSh-41 is.

A A PPSh-41 is a select fire submachine gun.

MR. FORRESTER: Objection, Your Honor.

THE COURT: Is that still foundation?

MR. FORRESTER: If I can be heard outside the presence of the jury. Yes, it is, the answer to your question.

THE COURT: Well, if it's foundation, then I'll overrule it. You may answer the question.

THE WITNESS: Yes, sir.

A PPSh-41 is a model of a select fire submachine gun. It was a World War II vintage battle rifle that was used by various militaries during World War II.

[10] BY MR. MARTENS

Q Now, this investigation that was being conducted, who was actually conducting the investigation of Interordnance with regard to PPSh-41s? Were you personally involved?

A Yes, sir.

Q Were there other agents involved?

A Yes, sir.

Q Were witnesses called before the grand jury?

A Yes, there was.

Q Do you know who some of the witnesses called before the grand jury were?

A Yes, sir. There were witnesses, in addition to government agents, that were called before the grand jury was previous Firearms Technology branch chief, retired from ATF, his name is Edward Owen. He used to be the branch chief of that branch. Interordnance employees were called before the grand jury, as well as customers. Mr. Victor Rita, who sits at defense table, was also called as a witness before the grand jury regarding the PPSh-41 machine guns.

MR. MARTENS: Your Honor, if I may approach the witness?

THE COURT: You may.

BY MR. MARTENS

Q I'd like you to looke [sic] at what has previously been [11] marked as Government's Exhibit 11. Ask if you recognize that.

(Hand document to witness.)

A Yes, I do.

Q What is Government's Exhibit 11?

A This exhibit is a transcript from the grand jury testimony of Mr. Edwin Owen, who I mentioned earlier, a retired firearms expert that previously worked for the ATF in Washington, D.C. It has his name on it, that's how I know.

MR. MARTENS: Your Honor, we have a stipulation this is a true and correct copy and defense counsel has stipulated to that, so we would ask to move Government's Exhibit 11 into evidence.

THE COURT: Any objection?

MR. FORRESTER: No, Your Honor.

THE COURT: It's admitted.

Ladies and gentlemen, it is stipulated and agreed by the parties that this is an exact transcript of the testimony given by Agent Owen. You may proceed.

(Government's Exhibit No. 11 received.)

BY MR. MARTENS

Q Could you tell the jury what the date is that Edwin Owen testified before the grand jury?

A Yes, sir. The date on the cover is dated May 6th, [12] 2003.

Q Prior to being in court today, have you had the opportunity to review Agent Owen's testimony as contained in Government Exhibit 11?

A Yes, sir, I have reviewed Mr. Owen's testimony.

Q Did he testify about a particular firearm?

A Yes, sir. As you can see, the testimony was very thick. He was in the grand jury for a long time. And it's my recollection that all three firearms that we were investigating were shown to Mr. Owen, and by reviewing the transcript, I verified that he made comments on all three of the guns during the course of his testimony in front of the grand jury.

Q When you say all three of the guns, does that include specifically the PPSh-41?

A Yes, sir, it does.

Q Was he the only grand jury witness called with regard to the PPSh-41?

A No, sir.

Q Did there come a time when a decision was made to—well, let me actually—strike that for a second.

Were you involved in what was called a recall of the PPSh-41?

A Yes, sir.

Q Can you explain to the jury what exactly a recall of [13] the PPSh-41 is?

A Yes, sir. The recall involved the PPSh-41 and also the other two firearms that I spoke of earlier.

MR. FORRESTER: Objection, Your Honor.

THE COURT: You were referring specifically to the PPSh-41, weren't you?

MR. MARTENS: I believe I did ask was he involved in the recall of the PPSh-41.

THE COURT: Yes. I strike it as to the other guns at this point.

BY MR. MARTENS

Q Let me ask you this: Were you involved in a recall as part of your investigation of Interordnance?

A Yes, sir.

Q And when did that recall occur?

A The recall was initiated in April of 2003.

Q And can you explain to the jury what the recall involved?

A Yes, sir.

The recall involved ATF agents actually contacting the customers that purchased the firearms parts kits that ATF had in question and was under investigation.

The experts at our technology branch had determined that those three particular types of firearms were classified as machine guns, which would cause them to have [14] to be registered. And due to the fact they were not registered, it was decided that ATF, if we knew who purchased those items, to make an effort to contact those customers and collect those parts kits back. That was the gist of the recall and it did include all three of the firearms that I mentioned.

Q Again, when you say all three, what are all three for the jury?

A The Styer MP69 which is a small pistol-looking like machine gun. The FNFAL Imbell, FNFAL rifle, which is a very large battle rifle. And the PPSh-41, which is the select fire submachine gun that we're talking about here in this case.

Q Are you familiar with a gun known as an RPK?

A No, sir, I'm not familiar with an RPK.

Q Was an RPK part of the recall?

A No, sir.

Q Did there come a time when a decision was made to call the defendant, Victor Rita, to the grand jury?

A Yes, sir.

Q Were you involved in that decision?

A Yes, I was.

Q Why was Mr. Rita called to the grand jury?

A Mr. Rita was called to the grand jury—the decision was made after I was contacted with ATF Special Agent Bonnie [15] Levin. She is assigned to the Miami Field Division, nearby where the defendant, Mr. Rita, resides.

During the course of our investigation—can I speak to how we found these people, Your Honor?

THE COURT: Not unless it is part of the response that has been asked here. That is, was he called to the grand jury.

MR. MARTENS: Well, my question actually, Your Honor, was why was he called to the grand jury.

THE COURT: Why was he called. Okay. You may explain why he was called.

THE WITNESS: He was called after Agent Levin had contacted me.

The way we sent the recall out is we actually provided invoices to the agents in the field that we knew had purchased these three firearms in question. Well, Agent Levin received a package, a request from the Charlotte Field Division, who Charleston falls under, which is the office above where I work. The Charleston Field Division sent these packages out and included a memo explaining that the Firearm Technology Branch had classified these as machine gun. They were unregistered. They have to be collected, is basically what it said. And it also included an invoice from the company of Interordnance, with the person's name who purchased it and their address.

[16] Agent Levin called me and informed me that she had made contact with the defendant, Victor Rita, for the purpose of collecting that PPSh-41 parts kit that was listed on the invoice. And through my conversation with Agent Levin, I learned that the defendant, Victor Rita, sent the PPSh-41 parts

kit back to Interordnance, who was the subject of our investigation, rather than turn that evidence in to ATF.

During the course of my investigation I learned that he wasn't the only person that this same set of circumstances had applied to.

So we felt it was important and I felt it was important that the grand jury know why that article was sent back rather than surrendered to ATF. And if there was any conversation with anybody in particular at Interordnance, if there was any person there that was actually directing people not to turn the evidence in to the government, and rather send it back to the subject of the investigation, I felt that was important for the grand jury to know.

Q At the time a decision was made to call Victor Rita as a grand jury witness, did you have information that other people had had conversations with Interordnance?

A Yes, sir.

Q What was that information that you possessed at the time?

* * * *

[121] MR. FORRESTER: If I go over 25 minutes, I'd like either that or for somebody to either whisper—

THE COURT: How about if I just give you the hook? (Laughter)

We'll notify you—would you do a favor, about 9:30 or a few minutes after that, if you would tell that jury that we're finishing up a matter and we'll be with them very shortly. (Referring to another jury deliberating on another case.)

COURT SECURITY: Yes, sir.

THE COURT: All right. You may bring the jury back in, please.

(Jury enters courtroom at 8:34 a.m.)

(Closing arguments of counsel.)

THE COURT: Thank you, Mr. Martens.

Gentlemen, as I prepare to instruct the jury, if you would look at your instructions under the offenses set out, you will find a heading that says Count One, about the declarations and unanimous agreement. Do you see that page?

MR. FORRESTER: Yes, I do.

MR. MARTENS: I'm sorry. Can you describe that page again?

THE COURT: It says "Count One" and it refers to declarations and unanimous agreement.

MR. MARTENS: Yes, Your Honor.

[122] THE COURT: All right. That really should refer to Count Three where there are two separate allegations, and so I've changed that to Count Three when I get to it.

Now, ladies and gentlemen, you have heard all the evidence in this case, as well as the closing arguments on behalf of both the parties. It becomes my duty, therefore, to instruct you on the law that you must follow and apply in arriving at your verdict in this case.

It's my duty to preside over the trial and to determine what testimony and evidence are relevant for your consideration, and then at the end of the trial, it's also my duty to instruct you on the law applicable in the case.

You, as jurors, are judges, judges of the facts. But in determining what actually happened in this case, that is in reaching your decision as to the facts, it's your sworn duty to follow the law as I now am in the process of defining for you, and you must follow all my instructions as a whole.

You have no right to disregard or to give special attention to any one instruction that I may state for you. That is, you

must not substitute or follow your own notion of what the law is or what you think the law ought to be. It's your duty to apply the law as I give it to you regardless of the consequences.

By the same token, it's also your duty to base [123] your verdict solely upon the testimony and evidence in this case without prejudice and without sympathy. That was the promise you made and the oath you took before being selected as jurors in this case, and both sides have a right to expect nothing less from you.

The indictment, which I will go over again in a few moments with you, in this case is not evidence of guilt. Indeed, a defendant is presumed through the law to be innocent. The law does not require a defendant to prove his innocence or to produce my evidence at all. And no inference whatever can be drawn from the election of a defendant not to testify.

The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so, then you must acquit him.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It's only required that the government's evidence exclude any reasonable doubt concerning the defendant's guilt.

As stated to you earlier, it's your duty to determine the facts, and in so doing, you must consider only the evidence that I've admitted into the case.

The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted into the record, and [124] any stipulations, and you'll recall specifically that closing arguments do not constitute evidence in the case.

Remember that any statements, objections, or arguments made by the lawyers do not constitute evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences which might otherwise escape your notice.

It is for you to determine what the facts are, and it is not for the lawyers to engage your passions or to inflame your prejudices or to try to command your sympathies. You must, in a cool and calm manner, make your decisions based upon what you find the facts to be. So it's your own recollection and interpretation of the evidence that controls. What the lawyers say, as I've already said, is not binding upon you.

Also during the course of the trial I might have asked a question or perhaps admonished a witness about the manner in which he or she should respond to the questions of counsel. Do not assume from anything that I may have said that I have any opinion concerning the issues which are for you, except for my instructions to you on the law. You should disregard anything that I may have said during the trial in arriving at your own findings as to the facts.

[125] So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense leave you to draw from the facts which have been established by the testimony and the evidence in this case.

You also may consider either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight

that you shall give to evidence, whether it's direct or circumstantial. What the law does require is that you consider all of the evidence and that you be convinced of the defendant's guilt beyond a reasonable doubt before any defendant can be convicted.

Now, I've said that you must consider all of the evidence. This does not mean, however, that you must accept all the evidence as true or accurate.

You're the sole judges of the credibility or believability of each witness who has testified in this case. But in weighing the testimony of that witness, you [126] should consider that witness's relationship to the government or to the defendant; the interest, if any, in the outcome of the case; the manner of testifying; the opportunity to observe and acquire knowledge about the facts to which the witness has testified; the candor and the fairness of the witness; the extent to which the witness has been corroborated by other credible evidence, and whether there were material inconsistencies within the witness's own testimony at trial.

If you find that a witness has contradicted himself or been contradicted by other credible evidence, then you should decide what weight, if any, that witness's testimony is entitled to.

Inconsistencies or discrepancies, though, in the testimony of any witness and between the testimony of different witnesses, may or may not cause the jury to discredit that testimony. Two or more persons witnessing an event or an incident may see it entirely differently. And innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the testimony, the effect of that discrepancy, you should always consider whether it pertains to a matter of importance or merely an unimportant detail, and whether the discrepancy resulted from innocent error or intentional falsehood.

You may, ladies and gentlemen, in short, accept or [127] reject the testimony of any witness in whole or in part.

Also the weight of the evidence is not necessarily determined by the number of witnesses testifying as to any particular fact. You could find the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You will recall that there were several exhibits introduced into evidence, ladies and gentlemen, which are called stipulations. Those stipulations, they're agreements as to those particular facts. This means that both sides accept those facts as true, so there's no need for further evidence from either side on that point. You may accept those stipulations of fact as true, even though nothing further was done to support those stipulations.

I'll find the indictment here in just a moment.

Ladies and gentlemen, there are five separate counts in this indictment. All five of them essentially regard the same activity.

But in Count One, after some preliminary statements, Count One charges that on or about October 27th of 2003 in Mecklenburg County, that the defendant, Victor A. Rita, Jr., while under oath and testifying in a proceeding before the grand jury, knowingly made a false material declaration. That is to say—and then it refers to the testimony, and specifically the testimony which is alleged [128] to be false is underlined. And it's in this grouping of questions and answers, and the question ultimately is—well, let me just read them all. "Have you placed any telephone calls to the company since the time you purchased the parts kit in January of 2003?" And the answer is, "Yes. I've already told you I did." Then the question is, "Those were the ones where you called them after you have had sent the parts kit back." And the answer is, "Correct." And the next question is, "Did you have any other

conversations with them by telephone?" And the answer—this is the underlined part which the government contends is inaccurate: "Answer: No, sir."

So that's what's alleged in Count One to be perjurious testimony. That's brought under Title 18, U. S. Code, Section 1623. And that part of the law says that whoever under oath in any proceeding before any grand jury of the United States knowingly makes any false material declaration shall be guilty of an offense against the United States.

Now, I also refer at this point to Count Three, which is a similar charge under Section 1623. And it is alleged in Count Three, after a series of questions, this question: "Did the agent ever ask you to return the PPSh parts kit?" And then you'd find this underlined, which means the government contends—and, of course, the [129] defendant contends otherwise, that the answer, "No, sir. She asked me to surrender the RPK kit."

That's one of the sections. The other section is, the question is, "Sir, did you have any discussion with the agent about the PPSh parts kit?" And the answer, and this is underlined, which means there's a contention that it is perjurious, "None at all."

Those are the sections which the government contends under Section 1623(a) is—comes within that statute.

In order for the government to prove the case in each of Counts One and Three, it must prove several elements beyond a reasonable doubt.

First, that the defendant actually gave the testimony under oath before the federal grand jury.

Secondly, that the defendant testified as detailed in Counts One and Three.

Thirdly, that the testimony identified by the underlining that I just mentioned was false when he gave that testimony.

And fifth, that the false statement was material.

A statement is material if it has a natural tendency to influence or is capable of influencing a decision. However, statements can still be material even if it does not actually deceive. And, ladies and gentlemen, a [130] defendant must give that statement knowingly that it is an untruth.

Now, in Count Three, the only addition to what you have to look for in Count Three and over and above Count One, is that there are two different contentions about false statements in Count Three.

So in Count Three it alleges that the defendant knowingly made two false statements under oath. In order for you to convict, the government is not required to prove, and you need not find, that each of those statements was, in fact, false. But the government must prove beyond a reasonable doubt to each of you that at least one of the specified statements alleged in Count Three was false.

It is not sufficient for some members of the jury to agree that one of the statements is false, while others of the jury agree that the other statement is false. There must be at least one specific statement that each of you agrees is false, and that each of you agrees that the defendant knew was false.

The government is required to prove beyond a reasonable doubt, and you must unanimously find in other words, that at least one of the statements contained in Count Three was false and that the defendant knew that that statement was false.

Now, in Counts Two and Four it is alleged [131] essentially the same kind of thing, because they arise under Title 18 U. S. Code, Section 1001.

Count Two charges at the time, the same date, October 27th 2003, in a matter which was before the judicial branch or the legislative or executive branch of the government, the

defendant knowingly and willfully made a materially false, fictitious and fraudulent statement.

And Count Four charges the same thing. They are parallel counts to Count One and Three. But in Counts Two and Four he's charged, as I said, with violating Section 1001, Title 18. That section of the law provides that whoever in any matter within the jurisdiction of the executive, legislative or judicial branch of the government of the United States, knowingly and willfully makes any materially false, fictitious or fraudulent statement or representation, shall be guilty of an offense against the United States.

The elements which the government must prove beyond a reasonable doubt as to each of those two counts is that, first, the defendant knowingly made a false, fictitious or fraudulent statement as alleged in the indictment in Count Two or Four.

And secondly, that in making the false, fictitious or fraudulent statement, the defendant acted willfully.

Thirdly, that the statement was made in a matter [132] within the jurisdiction of the executive, legislative or judicial branch of the government.

A statement is false or fictitious if it was untrue when it was made and then known to be untrue by the person making or causing it to be made.

A statement is fraudulent if it is known to be untrue or caused to be made with intent to deceive.

A statement is material—I'll give you the same instruction on material that I gave you on Counts One and Three—if it has a natural tendency to influence or is capable of influencing a decision. However, a statement can still be material even if it does not actually deceive.

Count Five of the indictment alleges on the same day, October 27th, 2003, that the defendant, Mr. Rita, corruptly influenced, obstructed, impeded and endeavored to influence,

obstruct and impede the due administration of justice by causing false and misleading information to be given to the grand jury. That's a violation of Title 18, U. S. Code, Section 1503. And that that section of the law provides whoever corruptly influences, obstructs, impedes or endeavors to influence, obstruct or impede the due administration of justice shall be guilty of an offense against the United States.

In order for the government to prove its case it must do so beyond a reasonable doubt and it must prove each [133] of the following:

One, that the grand jury proceedings identified in the indictment was pending at the time of the alleged indictment.

Secondly, that the defendant knew that the grand jury proceeding was pending.

Thirdly, that the defendant provided false and misleading information to the grand jury as alleged in the indictment.

And fourthly, that in doing so the defendant corruptly endeavored to influence, obstruct or impede the due administration of justice.

To act corruptly, as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of improperly influencing and obstructing or interfering with the administration of justice.

The term "endeavors" as that term is used in these instructions means to knowingly deliberately act or to knowingly and deliberately make any effort which has the reasonable tendency to bring about the desired results. It is not necessary for the government to prove that the endeavor was successful or, in fact, achieved the desired results.

Now, in Count Five of the indictment it's alleged the defendant made several false statements under oath. In [134] order for you to convict, the government is not required to prove to you that all of the statements alleged in Count Five

are false. The government, however, must prove beyond a reasonable doubt to each of you that at least one of the specific statements alleged in Count Five was false.

It is not sufficient that some member of the jury agree, as I've said in Count Three—it's not sufficient that some agree that one thing is false and others agree that another thing is false. There must be at least one specific statement that each of you agree was false, and that each of you agrees that the defendant knew that it was false.

The government is required to prove the guilt beyond a reasonable doubt, and you must unanimously find, in other words, that at least one of the statements alleged in Count Five was false and that the defendant knew that the statement was false.

I've charged you several terms that need a little more definition. One is "on or about a certain day", and you'll note that the indictment charges on or about certain dates.

The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt the events or offense that was committed took place on a [135] date reasonably near the date alleged.

I've used the term "knowingly" in these instructions. And that word, as it's been used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

I've also used the term "willfully" in these instructions. That means that the act was committed voluntarily and purposely. That is, with specific intent to do something which the law forbids. That is to say, with bad purpose to either disobey or to disregard the law.

Now, ladies and gentlemen, as I've mentioned to you, there are five separate counts and you must consider each of the five separately.

The number of charges against the defendant is not evidence of guilt and your decision on any one charge, whether it's guilty or not guilty, should not influence your decision on any other charges. Each offense and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any of the other offenses.

I caution you, members of the jury, that you're here to determine the guilt or innocence of the accused from the evidence in this case. The defendant is not on trial for any act or conduct or offense not alleged in the [136] indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other party or persons not on trial as a defendant here today.

Also, the punishment which is provided by law for the offenses alleged in these charges is a matter exclusively within the province of the Court, that is, the judge makes the determination of the sentence, and it should never, ever be considered by you, the jury, in arriving at the verdict in the case. And you must arrive at an impartial verdict in the case without any regard to what sentence may or may not come.

Now, I charge you, ladies and gentlemen, that any verdict you may reach in the jury room, whether it's guilty or not guilty, must be unanimous. In other words, to reach a verdict you must all agree.

Your deliberations will be in secret and you'll never have to explain your verdict to anyone. It's your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full consideration of what each of your fellow jurors has to say.

While you're discussing the case, do not hesitate to change your mind if you become convinced that you were wrong. But

never ever give up your honest belief solely because others may think differently or merely to get the [137] case over with. Remember, ladies and gentlemen, that in a very real way, you're the judges, judges of the facts. Your only interest here is to seek the truth from the evidence in this case.

Upon retiring to your jury room you should first select one of your members to be your foreperson. Your foreperson will preside over your deliberation and be your spokesperson here in court.

There's a verdict form which you will have with you and you can't see it from where you sit, but it is a two-page document and it is appropriately entitled, "Verdict," and it reads as follows, and you'll proceed as follows: "We the jury in the above-styled case, do find the defendant, Victor A. Rita, guilty or not guilty," and your foreperson will fill in whichever your unanimous verdict may be, of the crime charged in Count One in the indictment.

And then you'll move to the second. "We, the jury in the above-styled case, do find the defendant, Victor A. Rita, Jr. guilty or not guilty," whatever your unanimous verdict will be, your foreperson will fill it in. You'll go through each of five numbers here because there are five counts, and you will fill in either guilty or not guilty, whatever your unanimous verdict may be.

When those five blanks are filled in, your foreperson will then sign it and date it, and you'll be [138] ready to return to the courtroom to deliver your verdict.

Now, with you in the jury room, ladies and gentlemen, you will have the exhibits which have been introduced into evidence here. You'll also have a copy of the indictment, which I have here in my hand. You will have the verdict form, which I have here in my hand. And you will also have a copy of the instructions, which I have just given to you this morning.

If there should come a time that you need to talk with the Court or ask a question of the Court, have your foreperson write that comment or question down on a piece of paper and sign it. It will then be delivered to me and I'll either get back to you in writing or I'll call you back in here to discuss whatever it is you want to discuss.

If the latter happens and you come back in here and we discuss it, never ever at any time reveal to me or anyone else what your numerical division may be at that time. That's not for me to consider and that's not for anybody else to hear. Your discussions and where you stand are up to you, not up to me.

Now, ladies and gentlemen, it is now a quarter of ten. I probably will check on you around 11 o'clock to see if you want to take a break.

I'm not in any way indicating how long you should deliberate. That's your business, not mine, nor anyone [139] else's. That's your sole and separate business. But we'll check to see if you want a break and if you want one, we'll let you go for that break. But do not—let's not have part of you deliberate while some are out of the room. Everybody is entitled to participate in all of the deliberations that take place.

What we'll do is if you want a break, Mrs. Hankins will come back, as you take a break, and then you will not begin your deliberations again until Mrs. Hankins comes back in and counts you. We have to do that for the record. So please be guided by that.

Now, if you need a break before 11 o'clock, all you've got to do is let me know. We're here to serve you and all you've got to do is let us know.

Now, looking over the jury completely it looks to me like—it looks to me like everybody is ready to deliberate this matter, and that means that, Mrs. Rankin and Wofford, our jurors No. 13 and 14.

The Constitution of the United States will not allow 14 people to deliberate on a case, and so we can only have 12. I'm sure that you would agree Mrs. Rankin and Mrs. Wofford both would be excellent jurors and you'd like to have their services with you, but we can't do that. Of course, they've served well, but if any of you had had an emergency or sickness, they would have stepped in and been [140] one of the original 12.

So Ms. Rankin and Mrs. Wofford, do you have anything in the jury room?

JUROR RANKIN: I don't.

JUROR WOFFORD: No, Your Honor.

THE COURT: I'm going to ask you to step down right beside the door there for a minute, if you will. You'll be shown where to stand there and I'll tell you why in a minute.

Ladies and gentlemen, we have found over the years that jurors sometimes become good friends immediately and sometimes lasting friends, so before you have to leave Mrs. Wofford and Mrs. Rankin, I want to give you an opportunity to say goodbye to them. Now, you don't have to say goodbye, you can ignore them if you want to, that's your privilege. But they are standing there so they'll have an opportunity to say goodbye to you as you go to your deliberations. They are going to be free to go or stay as they choose to do, but they will not be participating in your deliberations.

Thank you, ladies and gentlemen. You may go.

(Jury leaves courtroom at 9:49 a.m.)

THE COURT: Anybody—wait just a minute. If you all will have a seat there just a minute, please.

Anybody have any objection or additions to the [141] instructions as given? Mr. Martens?

MR. MARTENS: No, Your Honor.

THE COURT: And Mr. Forrester?

MR. FORRESTER: None, Your Honor.

THE COURT: Thank you. You may take a copy of this then with you. Here you are.

MR. MARTENS: Do you want the exhibits to go back right now?

THE COURT: Yes.

MR. MARTENS: I assume we're not sending the gun back.

THE COURT: No. Does it have the locks on it?

AGENT SCHROEPFER: It's nonfunctional, Your Honor. It's been disassembled completely and tie-strapped.

THE COURT: Since I did not mention that, it will go back to the jury. I won't bring them back to tell them, I'll just send it back. So that will go back in the jury room.

AGENT SCHROEPFER: It will, Your Honor.

THE COURT: All right. If you all will all be around the building somewhere, but before everybody gets out, does anybody have any objection if I send Ms. Hankins back about 11 o'clock to inquire if they do want to take a break, and if they do want to take a break then she will go back in and count them before they begin deliberations and [142] she will tell them if they are taking a break, they are not to deliberate until all 12 of them are there and have been counted. Anybody have any objection to just doing it that way?

MR. FORRESTER: No objection.

MR. MARTENS: No objection.

(End of testimony and instructions.)

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed JUN 3, 2005]

DOCKET NO 3:04CR105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.

Defendant.

MOTION FOR DOWNWARD DEPARTURE

FACTS AND PROCEEDINGS

The Defendant, Victor A. Rita, Jr., was found guilty after a trial on November 8, 2004, to Count One through Count Five of a criminal indictment charging him with violations of Title 18 U.S.C. §§1001, 1503 and 1623; Making False Statements, Obstruction of Justice and, Fraudulent Statement before a Grand Jury.

This case is ancillary to the investigation of Inter Ordnance of America, LP (IO) a North Carolina company which was indicted for violating Title 18 U.S.C. Section 922(o); Illegal Importation of Firearms. Mr. Victor Rita, Jr., (Mr. Rita) is a residence of the State of Florida. He ordered two different firearms "parts kits" from (IO) in January 2003.

Mr. Rita served in the Vietnam Era Conflict and in Operation Desert Storm. In the United States he assisted governmental agencies with weapons training for law enforcement officers. His interest in model firearms used in wars, led to his collection of model firearm "parts kits". Within a 30-day period beginning on or about January 9,

2003, Mr. Rita ordered two different "parts kits" from IO. He purchased a PPSH-41 "parts kit" and then a RPK "parts kit". The impetus to purchase these "parts kits" by this gun enthusiast was the advertisement of IO. The items were advertised as "parts kits" as opposed to firearms. "Parts kits" or "dummy guns" have inoperable receiver. The receiver houses the firing mechanism for assault weapons.

On or about September 4, 2004, Mr. Rita contacted Special Agent Bonnie Levin of the Bureau of Alcohol, Tobacco, Firearms & Explosives-Miami Group I (ATF); after hearing an old telephone message. The time was approximately eight months after the relevant purchases from I0. The agent called concerning the abandonment of a "parts kit" Mr. Rita had purchased in January 2004. Mr. Rita's understanding was that the agent wanted the last "parts kit" he had ordered; the RPK model. The agent's actions with the defendant's former attorney, Neil G. Taylor, Esq., would support the premise that there was confusion and negligence. The agent called Mr. Taylor's office to confirm transfer of the "parts kit" before visiting his office to retrieve it.

Due to Mr. Rita's job assignment on a U.S. Coast Guard Cutter in Key West, FL and other engagements; he arranged for the transfer of the kit to the Government via his former attorney, Neil G. Taylor of Miami, Florida. Mr. Rita relinquished possession and control of the RPK parts kit, to Attorney Taylor on or about September 9, 2003. The attorney and the ATF agent, who is also a law school graduate, made arrangements for the delivery of the "parts kit" to the ATF. Apparently neither professional; attorney or agent confirmed which particular "parts kit" was to be delivered. Again the chain of events demonstrates the lack of diligence by the case agent. Written confirmation was not sent to Mr. Rita, as was directed by the ATF; and again no written confirmation to Mr. Taylor before the delivery date and time. It was in the meeting at Mr. Taylor's office after discussing their other

mutual acquaintances that the agent told Attorney Taylor that she believes he has the wrong "parts kit". This happened after she examined the contents of the box it was in.

When questioned concerning the relinquishment of the "parts kit" his answers and actions were inconsistent with expected behavior by the Department of Justice. On October 27, 2003, as part of the investigation concerning IO, Mr. Rita was subpoenaed to testify before a grand jury in Charlotte, NC. At the proceeding Mr. Rita gave answers contrary to his literal actions. Though technically inaccurate, Mr. Rita still believes the contextual sincerity of his answers was and is responsive to the questions posed. The government believes and proved otherwise at trial.

Mr. Rita voluntarily retired from the Department of Homeland Security-Immigration and Naturalization Services. Though 17 years ago he left after being convicted of a firearm related offense; he was rehired by the same governmental agency until his retirement in 2003.

Mr. Rita's service to our nation includes employment with: the military; Department of Homeland Security and; the Untied States Coast Guard. During this time, while raising a family, Mr. Rita completed an Associate of Arts Degree.

Mr. Rita is the co-parent of two boys. One is a teenager and the other is a 25 year old college student. Both are mutual children of him and his wife. Along with his wife; Mr. Rita supports the boys, financially and otherwise. Mr. Rita was decorated with more than 35 military awards or medal. His retirement plans are to spend more time with his sons and work to help defray the college cost of his older son. Due to severe sickness from: Type II Diabetes Mellitus; an enlarged prostate; infections on his legs and neck; skins rashes and infections fro [sic] exposure to Agent Orange; a herniated disk in his lower back; hyperlipidaemia; arthritis and; sleep apnea, every day is an endurance test. He continues to visit

his doctors and takes numerous medications to treat the symptoms.

Currently, Victor A. Rita, Jr., works at Miami Jewish Homes as a dispatcher for their transportation department. His goals are to see his sons graduate from college and enjoy his golden years in serenity with his wife of over 25 years.

Mr. Rita is presently scheduled for sentencing on June 7, 2005. Based on the advisory United States Sentencing Guidelines (U.S.S.G.) Chapter 5, Part A, he has a total offense level of 20 and a criminal history category of I the guideline range for imprisonment is 33 to 41 months for being found guilty of the aforementioned violations. Mr. Rita submits the following for the Court's consideration in determining an appropriate sentence below the guideline range.

In the recent unpublished decision in *United States of America V. Joyce Lee Higdon*, No 99-4837 (4th Cir. 2001), the Fourth Circuit reiterated its requirement that a motion for downward departure be subjected to the three-part analysis developed in *United States v. Brock*, 108 F.3d 31, 33-4 (4th Cir. 1997), and *Koon v. United States*, 518 U.S. 81, 95 (1996). Upon identifying distinguishing features, the court must next ask a series of questions to determine whether it should depart: Has a factor been forbidden by the Commission and is it thus a potential basis for departure? In order to determine whether the factor actually may support a departure, the court must ascertain into which of the following categories the factor falls: (I) a factor encouraged by the Commission as a basis for departure and is it either (a) taken into account in the applicable guideline itself or (b) not taken into account in the guideline; (2) a discouraged factor by the Commission as a basis for departure; or (3) a factor unmentioned by the Sentencing Commission.

I

DEPARTURE BASED ON EXTRAORDINARY PHYSICAL IMPAIRMENT

Defendant's conditions are such that it could be termed as an "extraordinary physical impairment."

Mentioned Factor

It was the District Court's duty . . . to assess Johnson's condition at the time of sentencing," *United States v. Woody*, 55 F.3d 1257 (7th Cir. 1995). Gleaned from the presentence report we see that Mr. Rita suffers from multiple health issues. The combinations of sicknesses are taxing on his physical structure and his mental spirit.

The defendant suffers from high blood pressure and has little use of his back due to degenerative disk disease. The services at a non-medical Federal penitentiary are inadequate to accommodate his illnesses. Expectedly Mr. Rita is sullen concerning his future.

DOWNWARD DEPARTURE IS APPROPRIATE IN THE INSTANT CASE.

Infirmity

An extraordinary physical impairment may warrant departure under U.S.S.G. § 5H1.4 which allows non-custodial sentence for a seriously infirm defendant. The courts have upheld a downward departure where the defendant suffered from chronic obstructive pulmonary disease and the debilitating effects of cancer. *Untied States v. Ghannam*, 899 F.2d 327 (4th Cir. 1990). Mental retardation, scoliosis of spine and chronic pain may warrant departure under § 5H1.4 pursuant to *United States v. Slater*, 971 F.2d 626, 635 (10th Cir. 1992).

In this case defendant contends that his health has deteriorated since 2003. His physical decline is partially from the mental agony of defending an indictment 700 miles away

from his home. The evidence suggests that his health will continue to wane until life expires if he was to remain incarcerated for a long time. It is general belief that defendant will receive better care in a private facility than in an institution designed for punishment; not rehabilitation of the sick and injured. Living with his conditions means that Mr. Rita is more susceptible to infections a healthy person's body would repel and or recover from. *United States v. Johnson*, 71 F.3d 539, 545 (6th Cir. 1995) (under U.S.S.G. § 5H1.4, although "rare," downward departure [is] possible for a physician convicted of distribution of drugs and mail fraud based on his medical conditions where defendant was a 65-year-old man who suffered from diabetes, hypertension, hypothyroidism, ulcers, potassium loss, and reactive depression. However, specific findings required. Part C of the Presentence Report enumerates the many documented ailments of Mr. Rita.

A Combination of serious health problems is sufficient to allow departure.

"Combination of serious health problems requiring on-going monitoring plus prior" "charitable and civic good deeds" are sufficient to allow departure to level allowing home confinement, probation and community service." *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991). In *Greenwoood*, the defendant's time in the armed services was esteemed highly. Mr. Greenwood, loss both of his legs in war which required ongoing treatment. Mr. Rita served his country in two wars. In the Vietnam Era Conflict he contracted Agent Orange and is designated as disabled as a direct result of it exposure. He also served in Desert Storm. Mr. Rita has rendered a valuable service to the federal government.

Vulnerability To victimization In Prison.

Vulnerability to victimization in prison may be ground for departure. *United States v. Maddox*, 48 F.3d 791, 797-98 (4th

Cir. 1995). *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996). Case law states the sentencing court "in extraordinary and limited circumstances, vulnerability to victimization may be an appropriate consideration for discretionary departure." *United States v. Belt*, 89 F.3d 710, 714 (l0th Cir. 1996) (citing *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996). In the present case defendant has met the *Koon* criteria for vulnerability. *United States v. Volpe*, 78 F. Supp.2d 76, 89 (E.D.N.Y. 199 [sic]) ("Volpell") Defendant entitled to two-level departure because `"the extraordinary notoriety of this case coupled with this status as a police officer," left him "unusually susceptible to abuse in prison" and defendant may have to spend most of his time in segregation; *United States v. Bruder*, 103 F.Supp.2d 155, 182 (E.D.N.Y. 2000). Therefore granting of this motion would be appropriate.

Mr. Rita has demonstrated an industrious character which will stand him in good stead as he maintains his efforts at mental and physical rehabilitation. He is a veteran, husband and, father with strong convictions which leads him. He has had other run-ins with authorities yet his loyalty to his country has never wavered. Mr. Rita understands he has constitutional right to have ideological difference with the executive branch of our system. This remarkable fact is an extraordinary quality in Mr. Rita's life.

II

MILITARY SERVICE

Mentioned Factor

"Military, civic, charitable . . . . and similar prior good work are not ordinarily relevant to departures. Nevertheless, courts may downward depart for extraordinary military service". *United States v. Pipich*, 688 F. Supp. 191 (D.Md. 1988), (where defendant convicted of mail theft extraordinary military record warrants departure to probation [sic]. Defen-

dant was in Marines from 1968 and served in combat in Vietnam for one year. He received over 45 awards of the Air Medal, including one special award for heroism in connection with the extraction of a reconnaissance team. Departure for military service might be warranted under some circumstances *United States v. Neil*, 903 F. 2d 564, 566 (8th Cir. 1990).

CONCLUSION

The combination of efforts discussed herein takes this case out of the heartland of typical cases and justifies a significant downward departure. Most defendants do not come to sentencing with the wealth of lifetime achievement and service to their country as Mr. Rita. His sacrifice to country will continue because as a former federal officer he most probable will be ostracize and victimize at any institution.

Rita requests that the Court consider these factors in departing downwardly from his guideline sentencing range.

Respectfully submitted

This: the 2nd day of June 2005.

/s/ Denzil H. Forrester
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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CASE NO. 3:04-Cr-00105-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

VICTOR A. RITA, JR.,
Defendant.

The above entitled cause came on for sentencing hearing before the Honorable William L. Osteen, Judge of the above-styled court, at his chambers in the courthouse, Charles R. Jonas Federal Building, 401 West Trade Street, Charlotte, North Carolina, on Tuesday, June 7, 2005.

APPEARANCES

For the Plaintiff:	MATTHEW T. MARTENS, Assistant United States Attorney United States Attorney's Office Carillon Building, Suite 1700 227 West Trade Street Charlotte, North Carolina 28202 Telephone: (704) 344-6222
For the Defendant:	DENZIL H. FORRESTER, Esq. Post Office Box 32511 Charlotte, North Carolina 28232 Telephone: (704) 632-9992
US Probation Officer:	KYMM KAY, US Probation Officer North Carolina Western Probation Office 200 South College Street Room 1650 Charlotte, North Carolina 28202 Telephone: (704) 350-7610

[3] PROCEEDINGS

THE COURT: What are we calling here?

MR. MARTENS: This is 3:04-cr-105, United States versus Victor A. Rita, Jr.

Matthew Martens for the United States.

THE COURT: All right. Thank you very much, Mr. Martens.

Mr. Forrester, are you and your client ready to proceed here today?

MR. FORRESTER: Yes, sir, your Honor.

THE COURT: All right. There were—let's see. You had something under objections.

Other than the motion for downward departure that you submitted, do you have any other objections? And what I'm trying to do now is to determine where your client fits within the sentencing guidelines.

Do you have any objections to the pre-sentence report prepared by Ms. Kay as they affect sentencing guidelines, Mr. Forrester?

MR. FORRESTER: As they affect sentencing guidelines, no, sir, your Honor, because she issued—Ms. Kay issued a revised pre-sentence report on the 25th of May.

THE COURT: Right.

[4] MR. FORRESTER: Which addressed and clarified some of the objections, your Honor.

THE COURT: So you're in accord with the May 25 revised pre-sentence report?

MR. FORRESTER: As far as they don't affect his—well, certain things were not necessarily addressed, but those would fall under the offense characteristics, your Honor, but as far as them affecting the sentencing guidelines, no.

THE COURT: All right. Well, let me put it in another way. Is there anything that you have that you want to bring to the Court's attention that you think should be changed about the actual sentencing guidelines found by Ms. Kay?

MR. FORRESTER: No, your Honor.

THE COURT: All right. And, Mr. Martens, I take it you don't either?

MR. MARTENS: Well, I just actually as I was reviewing it again this afternoon I recognized what I believe is probably a typographical error—

THE COURT: All right.

MR. MARTENS: —in paragraph 43. [5] Paragraph 46 it makes a reference to an offense level of 24, but up above it refers to a level of 20.

THE COURT: Okay.

MR. MARTENS: And at the end it uses a level 20. So I think those should be corrected.

THE COURT: Do you agree with that, Ms. Kay?

PROBATION OFFICER KAY: Yes, sir.

THE COURT: All right. Thank you for catching that, Mr. Martens.

Under the ordinary sentencing guidelines, Mr. Forrester, you would agree then that your client is an offense level of 20, a criminal history category of 1, which means under the guidelines ordinarily your client would be facing 33 to 41 months of imprisonment, at least two years but not more than three years of supervised release, up to $75,000 in fine, and a special assessment of $500.

Do you agree with that?

MR. FORRESTER: I do agree, your Honor.

THE COURT: All right. Do you have any evidence that you want to present on an [6] appropriate sentence?

MR. FORRESTER: I do, your Honor.

THE COURT: You may present your evidence.

MR. FORRESTER: I submitted a motion for downward departure, your Honor.

THE COURT: Yes, sir.

MR. FORRESTER: Based on physical impairment. I think they are listed--well, all of them or most of them are listed in the pre-sentence report. I'll just jot over some of them right now.

Based on hypertension, degenerative disc disease, Type 2 diabetes, enlarged prostate, infection in his legs, skin rash due to exposure to Agent Orange while he was a foot soldier in Vietnam, arthritis, sleep apnea, and different respiratory ailments.

The third problem—the second problem rather would be vulnerability to victimization and also just different pressures while in prison.

THE COURT: Now, do you have any evidence that you want to present on that?

MR. FORRESTER: I believe we've—[7] Ms. Kay has some information concerning what Mr. Rita sent to her, and also I will proffer the sentencing recommendation that we don't have a copy of, but I believe your Honor and the U.S. Probation Office is privy to that.

Am I correct?

PROBATION OFFICER KAY: I'm sorry?

MR. FORRESTER: The sentencing recommendation table talks about how he's been threatened, his life has been threatened because he's testified on several occasions.

PROBATION OFFICER KAY: Your Honor, the sentencing recommendation section, I just have information that he

has testified in numerous criminal cases in the justification paragraph at the end, and I think that's what he's referring to.

The defense counsel and the U.S. Attorney, they don't get copies of that recommendation.

THE COURT: They don't get copies. Well, we do in our district, so I assume that everybody gets copies of that.

PROBATION OFFICER KAY: Right. Yes, sir.

THE COURT: All right.

[8] PROBATION OFFICER KAY: And the other thing that I think Mr. Forrester is speaking of is Mr. Rita had provided me copies of business cards of different agencies that he's worked for and testified against to include like the Border Patrol and also a subpoena where he was called to testify.

I think the last time he was called to testify was January '04, and this is a copy of the subpoena for that.

THE COURT: Well, that's a listing that was given to Ms. Kay by your client.

PROBATION OFFICER KAY: That's correct.

THE COURT: Now that does not constitute evidence.

Are you going to put on evidence to show that he should be getting a downward departure, or under 3553, your client would be entitled to a different sentence than he should get under sentencing guidelines, Mr. Forester?

MR. FORRESTER: I could call my client to the stand, your Honor.

Under the—well, I was under the understanding that at sentencing the evidentiary rules are somewhat lax.

[9] THE COURT: They are.

MR. FORRESTER: To where different matters, hearsay, I think proffered by the U.S. Probation Office and also by the

defendant would be seen and it would be gleaned upon in rendering a sentence by the Court.

THE COURT: But here's the problem with that: There are two ways to get a downward departure. One is by a 5K1 being filed by the Government, and ordinarily, the Government simply sets forth in the document itself what the defendant has done and sometimes they make a recommendation, once in a while they do not, as to how much time it should be reduced.

Now, if we don't follow that procedure, then I think under 3553 you would have a right to show why your client should be considered for a sentence of less than he would get under the guidelines because of his unusual cooperation. But a statement by a defendant I cooperated with DEA when they were investigating Sam Smith doesn't really tell me anything.

If I'm going to find out what he did or why his testimony or help was unique, I've got [10] to have some way of making that determination.

MR. FORRESTER: Okay.

THE COURT: Do you see what I'm trying to say?

MR. FORRESTER: I see what you're trying to say, your Honor. As a matter of fact, you've said it and I've comprehended it. However, I would like to say we're not moving for a downward departure based on any sort of cooperation with the Government. It's based—based in law under U.S. Sentencing Guideline I think Chapter 5H1.4.

THE COURT: Yes. All right.

MR. FORRESTER: When it concerns his physical condition, and I'll come back to that.

However, concerning vulnerability, the victimization in prison that we're actually going on with standing case law, your Honor, in brief cited U.S. versus Ghannam, which is a Fourth Circuit case.

It spoke about—well, that's more going towards physical condition where it talks about scoliosis of the spine and chronic pain, and in that the Court felt downward departure was warranted.

[11] In another case it talks about hypertension in someone of being 65 years old.

I will say that Mr. Rita is an advanced age—

THE COURT: Wait a minute.

MR. FORRESTER: Go ahead.

THE COURT: What's an advanced age?

MR. FORRESTER: Advanced age, your Honor.

THE COURT: Of what?

MR. FORRESTER: Let me grab —57. Anything over 55. Let me grab my notes from my—I did a bit of research on this, and if I could proffer it to you.

THE COURT: Well, you're not going to proffer me evidence that shows that everybody over 57 is advanced age. Now, if you get up into the 80s I might agree with you, but short of that, I'm a little bit skittish about finding that everybody is at an advanced age.

MR. FORRESTER: And please don't be skittish on my word. These are from basically Social Security published, your Honor. So I just want to show you.

THE COURT: Mr. Forrester, I don't believe we're on the same wavelength here [12] today.

MR. FORRESTER: I'm just saying that based on Federal Law, it reads individuals approaching advanced age 50 through 54.

THE COURT: What?

MR. FORRESTER: And it talks about significant limited vocation adaptability, but that's more as far as someone who's illiterate.

But basically advanced age as far as Social Security guidelines are concerned, and I know this is not a Social Security case, but still it is Federal Law.

THE COURT: But it's not—Federal Law—that may be true. I'm not exactly sure.

By the way, I was kidding with you about that.

MR. FORRESTER: I proffer you that. That's where I'm getting it from. I say nothing based on my own whim.

THE COURT: Well, what do you want me to take from the fact that Social Security says somebody who is 57 years-old does not have the same range of possible employment than someone who is under 57 might have?

What are you asking me to take from that?

[13] MR. FORRESTER: Take from that the vulnerability where Social Security might use that as a determination as far as someone's ability to adapt to different work conditions meaning that they can no longer dig a ditch.

If they're technically advanced age, then take from that my client, though, he's not in his 20s or 30s or in his 40s, he might not be able to be as competitive in the highly adversarial world of prison wall.

That's what I want you to take from that.

THE COURT: Well, I'm not sure how much I'm taking from that, but I must say this also: That if your client or anyone else contends that I can't do some kind of work, generally that's supported by some medical evidence that says I examined this man regularly, and I know that he can't pick up five pounds without running an injury to his back or something like that.

MR. FORRESTER: Well, I've proffered a list of paraphernalia that Mr. —I think you have downstairs, right?

THE DEFENDANT: Yes.

MR. FORRESTER: He was stopped by the [14] U.S. Marshals. Those are the medicines, those are the different instrumentality that he needs to maintain life as he knows it on a daily basis.

I know Ms. Kay—my client has submitted directly to the U.S. Probation Office a list of ailments, a list of medications.

If I can—

THE COURT: How many of these are—

MR. FORRESTER: Can I—

THE COURT: How many of these are medically prescribed?

MR. FORRESTER: All of them, your Honor.

THE COURT: Such as Vitamin E?

MR. FORRESTER: Vitamin E medically?

THE DEFENDANT: Yes. I have a copy of my medical records. That's all there described.

MR. FORRESTER: Can I proffer copies of his medical records? They're all here, your Honor.

THE COURT: Have you shown them to Mr. Martens?

MR. MARTENS: I'm fine.

MR. FORRESTER: He's waived.

THE COURT: All right. You may send them [15] up.

MR. FORRESTER: Okay.

THE COURT: What are we doing over here, Mr. Forester?

MR. FORRESTER: Sorry. You're reviewing. But there are more medicals and different records that weren't proffered. If I can submit some more.

THE COURT: All right. Well, let's see. Maybe we can take the easiest thing first.

You have submitted to Ms. Kay—this is from Mr. Rita—subject: Safety concerns.

I am enclosing a partial list of names and departments of individuals that I've provided information to or I have worked in conjunction with on various immigrations or other criminal investigations. If needed, you may contact them for verification. Some will know me by my proper name. Some will know me by another name, and others will know me as another name. If needed, I can provide additional names and departments.

Now there are names of people here whom I don't happen to know personally, but they're coast guard people, they're FBI agents, perhaps [16] some other organizations, City of Key West, Florida.

I don't have any idea what to make of that. Was that helpful information to him, or was it information that led to the discovery of seven terrorists, or was it simply you all ought to clean your ships or—I don't have any way to evaluate that.

How can I evaluate that?

MR. FORRESTER: Well, one way we can, your Honor, not necessarily that information because that was not sent to me, it was sent to Ms. Kay directly. I'm just—first time I'm finding out about that.

However, there is a subpoena from back in February of 2004. So I think that should be indicative of whether the quality of the testimony or the need to have Mr. Rita testify.

THE COURT: A subpoena for what?

MR. FORRESTER: They subpoenaed him as a witness to testify at trial. It's—I believe I proffered it to the Court in the materials up there.

THE COURT: Well, am I correct that nothing here would indicate anything of [17] particular consequence for me to review?

MR. FORRESTER: You are correct.

THE COURT: Okay.

And here is a department—here's a Department of Homeland Security saying we accept your voluntary retirement application, and it simply says how you keep health insurance and how you get your thrift savings package out.

What am I to make of that three-page letter?

MR. FORRESTER: Well, we could skip over that because in the pre-sentence report we understand he's retired. I believe that diminishes the value of that right now, but if—go ahead.

THE COURT: Here is a document that says my health and medical problems really started in Vietnam and were aggravated during Desert Storm. I requested copies of my medical records from Miami Veterans Affair Hospital to present. By doing it this way, you will have past and current information you requested.

I don't know what that's for, but what does that tell me?

[18] MR. FORRESTER: I'll say it again. Some of these documents it's the first time that I'm reviewing them. Actually, I'm not even reviewing them because I'm just getting them from Ms. Kay and passing them on to your Honor.

However, I will say this: It's a—I know that he has gotten disability in part of that because of his exposure to Agent Orange.

THE COURT: Okay.

MR. FORRESTER: Go on.

THE COURT: Give me some—we'll get to that about Agent Orange in a minute, but what you're doing is asking me to read these things that you haven't read.

Here is a net worth statement short form instruction. Please complete the net worth form statement in its entirety, and it's a one-page document.

I don't know what to make of that.

MR. FORRESTER: Not deflecting anything back to Ms. Kay, my client in Court maybe four minutes ago said he—when she first handed me a stack of medical records, he said there should be more than that, and I went over there to check on more than that, and I asked and see [19] more medical records and those are what I was handed.

I think—

PROBATION OFFICER KAY: Excuse me.

THE COURT: Here's a statement the declaration—

PROBATION OFFICER KAY: Excuse me. Those are what you took.

MR. FORRESTER: Okay. Those are what I took.

PROBATION OFFICER KAY: I didn't know what he wanted. He just said give me everything and he just grabbed what was in my file.

THE COURT: Well, you better screen these things so I'll know what to look at. I don't make any sense out of the first four, five documents that I've looked at. I have no idea what they say or mean of relevance here.

So what are we going to do here?

MR. FORRESTER: Well, if they don't provide evidence concerning disability, your Honor—

THE COURT: They do?

MR. FORRESTER: Come again?

[20] COURT: They do?

MR. FORRESTER: I said if they don't.

THE COURT: Well, I want you—you're the one who's presenting these, so you better look at these documents and tell me what if anything these documents show.

Somehow or another we need to get those to Mr. Forrester.

Here is a non-negotiable check for $571.90 made payable to Victor Rita.

Here's a subpoena—and this must be what you're talking about—a subpoena in a criminal case. You should report on Monday, February 23rd in the above-mentioned case, which is United States versus Juan Rivera.

What does that mean to us, Mr. Forester, that he was subpoenaed?

MR. FORRESTER: What it means—well, what it should mean to us, your Honor, is that in a criminal case when someone is subpoenaed, basically prosecution wants him there because they feel they're going to give value to the testimony and value to the evidence.

What that means, and reflecting back to my motion for downward departure, is that as my [21] client has said and I have said, he's testified in numerous criminal and immigration matters to where he has been threatened.

THE COURT: But this was a subpoena issued by a private attorney. This is not the U.S. Government issuing the subpoena. It's Benjamin Daniel.

THE DEFENDANT: He's a U.S. Attorney.

MR. FORRESTER: My client just whispered that he is a U.S. Attorney, Benjamin Daniel.

THE COURT: Well, what was the testimony that he gave that was helpful? Those are the things we have got to find out.

MR. FORRESTER: And I've offered to call the defendant to the stand, your Honor, or we can do it informally and maybe if Mr. Rita is allowed to stand up and expound on that.

THE COURT: No, no. I want you to tell me by proffer or I want him to testify.

MR. FORRESTER: Okay. I can tell you what I know about my client is this.

THE COURT: All right.

MR. FORRESTER: He worked over 17 years for what is now called the Department of Homeland Security.

[22] THE COURT: Okay.

MR. FORRESTER: During those times, both in New York and in Miami, he worked on immigration matters and other drug interdiction matters to where his testimony was used to put offenders away in prison. Those offenders threatened him directly and indirectly.

We have spent the last six months, and I have got letters to and letters from the New York City department where back in the '80s he worked with them concerning different drug matters, drug interdiction, and I've also written the Department of Personnel Management, to no success because they've been stalling.

I think Ms. Kay basically testified that she's also written concerning matters in his records that Mr. Rita states will show that there was a $50,000 bounty on his head to show

that he has testified in different matters to where he has been threatened to where sending him to jail, to prison, he's going to be amongst people he's helped put in jail, and his safety is in detriment.

THE COURT: Okay. So what you're saying is that he did this testimony because of the [23] work that he was employed to do in his livelihood that he testified against people he investigated?

MR. FORRESTER: That's correct.

THE COURT: And that as a result of that, some of those people are not happy with him and, therefore, he, like any policeman or sheriff or FBI agent who might be convicted of a crime, should be treated differently perhaps than other people because they may be subject to retribution. That's the theory?

MR. FORRESTER: That is the theory, and also that is the law according to Koon, Koon versus United States back in 19— I think '96 or '97.

THE COURT: I don't know that that's the law.

MR. FORRESTER: Well, that was the premise of the downward departure.

I'll read page 8 in my brief. In the present case, defendant has met the Koon criteria for vulnerability. Defendant is entitled to a two level departure because of the extraordinary notoriety of this case coupled with his status as a police officer [24] left him unusually susceptible to abuse in prison.

And to read on, defendant may have to spend most of his time in segregation.

Therefore, granting this motion would be appropriate.

THE COURT: Okay. All right. What else do you have that you want me to consider?

MR. FORRESTER: His military experience, your Honor.

THE COURT: All right, sir.

MR. FORRESTER: I'll spare you that. Do you want me to read that?

I don't want to read the case law, but I'll say this: He spent I believe, I don't want to be wrong, 24 years in our military, nine years active duty and fifteen years in the Reserves. And I will say this combination of factors: His physical impairment, vulnerability in prison and military service to this country would lead—would pray that this Court finds a downward departure is warranted in this case which is outside of the heartland of typical cases, your Honor.

I will say this: In addition to that, at [25] a time when most individuals are contemplating retirement options or different things to do with retirement, and certainly he lives in that area of the nation in Florida, Mr. Rita and his family are dealing with the negative consequences of this verdict on his road to purgatory was filled with many of good intentions.

He served this country on both a volunteer and I believe he was drafted—I'm sorry, volunteer. And also served in the Executive Branch by working with the Department of Justice. Placed his life on the line and also his family's life because his wife also works for the U.S. Government doing what most people say is probably the most important job right now, and that's border protection. That's what commentators if you watch them on the news, CNN, FOX, are saying are minding our borders, protecting our-boarders, number one. Ten years ago it used to be drug interdiction.

THE COURT: Are you saying border patrol work is the most hazardous duty work?

MR. FORRESTER: No, I'm not saying that. I'm saying some will argue it's the most [26] important.

THE COURT: Is the most important work for us to do?

MR. FORRESTER: Yes, yes.

THE COURT: Okay.

MR. FORRESTER: Obviously, the blemish to his character concerns the need for him to prove himself, and I think that's what this case comes down to. Okay?

I suspect a lot of that deficiency in Mr. Rita as far as him being technically correct come from some sort of deficiency from him falling short of his academic achievement earlier in life the first time around.

Certainly he's graduated with an Associate's in administration of arts, but as a child, as a young man, he left high school. He eventually got his GED.

However, in speaking with Mr. Rita, you'll find out that basically he can be tenacious as a book, and part of that comes from him having to always prove himself, and basically he had to grow up partly on his own in New York back in the '50s, '60s to where if you don't stand up for your right, you're going [27] to be stepped over.

But for that, you would see a humble man in front of you or you would see a humbler man at trial.

I say this, your Honor: The service this man has given to this country—I mean, it is appropriate that this Court take that and view it. As Booker would say, render a reasonable sentence to this man and his family, and that's it.

THE COURT: Mr. Forester, you simply have to excuse me because I'm failing to grasp some of the things that perhaps are being made clear to me and I just can't quite grasp them, but you're asking for a departure from the guidelines or a sentence under 3553 that is lower than the guidelines, and here are the reasons:

One, he is a vulnerable defendant because he's been involved in work which has caused people to become convicted

criminals who are in prison and there may be retribution against him.

Two, his military experience of 24 years, which include nine years active duty and 15 [28] years of Reserve duty, and I'm sorry, I missed the other categories after that. What are they?

MR. FORRESTER: Physical condition, your Honor. His health has been waning for the last four years.

THE COURT: Physical condition. What else?

MR. FORRESTER: I'm sorry?

THE COURT: What other categories?

MR. FORRESTER: Just three of them, your Honor.

THE COURT: Just three.

MR. FORRESTER: Physical condition, vulnerability in prison and the military service.

THE COURT: Well, the military experience would—what is that, because he has performed such good and extra-ordinary service for our country that he is entitled to special treatment?

MR. FORRESTER: Well, in addition to that, your Honor, I will say—well, I will say yes. I'm not privy to any extra-ordinary—actually, I am, and it's in the pre-sentence [29] report.

He has over 25 different medals—

THE DEFENDANT: Thirty-five.

THE COURT: Thirty-five I think it says.

THE DEFENDANT: Various medals, awards and nominations.

MR. FORRESTER: Yes, that is so. But in addition to that, I know that while in New York City he helped trained

different officers on the range, the shooting range with Immigration.

THE COURT: Okay. Thirty-five medals and training Immigration officers on the range.

MR. FORRESTER: Yes. He's also saying that he worked as a military intelligence officer with Covert Operative.

I've got some—

THE COURT: Are we going to get into that?

MR. FORRESTER: Are we going to get into?

THE COURT: To Covert Operations that he's been on. That may be secretive stuff.

MR. FORRESTER: Your Honor, I know the time is late, and if I need to proffer the appropriate evidence to convince this Court, then I—with all due respect, I would say [30] yes, your Honor.

I've got some more medicals right here. I think you have a copy of these matters up there. I want to believe so, but if not, I have no problem.

If I could drop these off and maybe your Honor could compare.

THE COURT: Okay. Well, I'm afraid that I might have missed something. So what I want you to do is take these back, these are the medical records, and show me the summary of what the doctors find his condition to be at that time in case I missed it. I want you to show that to me, Mr. Forrester.

Mr. Forester, have you looked at those?

MR. FORRESTER: I have looked at them, your Honor, but I have looked at other things that the letter concerning the Agent Orange we've discussed.

THE COURT: Is it in there?

MR. FORRESTER: Agent Orange, I don't believe.

THE DEFENDANT: Yes, Agent Orange is in there.

THE COURT: I saw a mention of Agent [31] Orange, that he complained of difficulties with that.

Is there a summary in there, Mr. Forrester?

MR. FORRESTER: There isn't a summary, your Honor, but the list I gave you which basically is the paraphernalia that I spoke about that he left down at the Marshal's Office. He couldn't bring them in, the medications.

THE DEFENDANT: The electronic equipment.

MR. FORRESTER: The electronic equipment.

That's probably the best summary.

THE COURT: Well, this—

MR. FORRESTER: I'll let you speak. It's a folded piece of paper of the first one.

THE COURT: Okay. Who did this document? Victor A. Rita, Jr.

THE DEFENDANT: I did.

THE COURT: 087365103. This is his summary of what he's taking?

MR. FORRESTER: It is, your Honor.

If I can proffer one last thing. I was just handed it by the U.S. Probation Officer.

THE COURT: All right, sir.

[32] MR. FORRESTER: That would pretty much summarize his ailments.

THE COURT: Now, here's a document, a letter from the Department of Veterans Affairs saying that they appreciate his having appeared and participated in the Agent Orange examination program. Your examination revealed that you have a history of DM Type 2 non-insulin requiring, whatever that is. I guess that's diabetes.

MR. FORRESTER: Yes, your Honor.

THE COURT: Sleep apnea, NTN elevated BP, hyperlipidemia, enlarged prostate, erectile dysfunction, skin rash, arthritis of your cervical spine, and acid reflux. Your PSA was initially elevated, and then repeat testing showed it was normal. Glucose, triglycerides and cholesterol were elevated. EKG normal and CAT scan was negative for chest or for malignancy.

Okay. I'll take this letter as an indication of what the Department of Veterans Affairs showed in 2004, May of 2004, a year ago.

Now attached to that is something else [33] that has completely different typing on it, but it talks about back and diabetes.

I'll take it from this that the back has caused him a lot of problems?

MR. FORRESTER: Yes, your Honor.

THE COURT: I don't know what I can take from this diabetes summary because I can't—I'm just not a medical doctor enough to read it. I'm not a medical doctor at all. I can't tell what this says about diabetes.

If you want to take that back and show me Mr.—hand that back to him, I'll try to tell you how to interpret it.

MR. FORRESTER: I'm sure the defendant can go into and explain it.

THE COURT: Well, I'm going to give you an opportunity to proffer, or he's going to have to testify then.

MR. FORRESTER: With the Court's indulgence, can I have a second?

THE COURT: Yes, sir.

Have you been privy to any of this information, Mr. Martens?

MR. MARTENS: Short answer, no.

THE COURT: What do you want to do here, [34] Mr. Forrester?

MR. FORRESTER: If I can have a second with my client.

THE COURT: Yes, sir.

MR. FORRESTER: But to answer that, you said any information. Some of that information he waived over, passed over.

THE COURT: Well, just now.

MR. FORRESTER: Oh, just now. Here you go.

THE COURT: That's all right. You just go ahead and find out what we're going to do here.

MR. FORRESTER: I'll proffer what was just said to me.

Basically with the uncontrolled diabetes, your Honor, he's losing sensation in his extremities, his hands, in his feet, bad blood circulation as far as generating oxygen towards different areas of his body.

THE COURT: That's what this will do for you, diabetes will do for you.

MR. FORRESTER: Yes.

THE COURT: How do I tell from that document what stage it's in or anything else?

[35] MR. FORRESTER: I believe I'm in the same boat you are, your Honor, because there is mention of it on here, but not being a medical doctor I can only take the word of my client when he talks about the pain he goes through, as far as the medication he has to take on a daily basis just to live what we would consider a self paranormal life as far as making sure that he doesn't ingest too much salt, trying to maintain his weight, as far as feeling numb at certain times during the day whether he's been resting or not active, or not having enough blood sugar or eating the right foods.

THE COURT: Okay. Essentially he's got to be very careful about his diet.

MR. FORRESTER: That's correct, your Honor.

THE COURT: All right. Well, most people with diabetes have to do that, don't they?

MR. FORRESTER: Yes, yes, I agree.

He just proffered that his diabetes has gotten worse. I would say this: Most people don't suffer from the long-term effects of Agent Orange which further complicates any illness that he might have.

[36] THE COURT: It very well may be true, but what we don't have is any—and I sympathize with him he is suffering from Agent Orange, and there is some indication on the letter that I saw that either they know he suffers from it or they know he contends he suffers from it, I don't know which, but I've got to find some basis of showing what that is doing for him in connection with these other things, and we don't have any medical on that, do we?

MR. FORRESTER: Well, I can only read from what's in front of me.

THE COURT : Please do.

MR. FORRESTER: And it says—and I'm not sure if this is related to diabetes. I'm not sure where it starts off.

It says headaches, stiffness, cervical, stiffness of the muscle. It talks about slowness. I guess this refers to his walk because it says gait.

THE COURT: Now, does that come from Agent Orange? Does it come from diabetes? Does it come from the bad back? Does the bad back come from Agent Orange?

MR. FORRESTER: Well, your Honor, I will [37] just submit this: That the source of it to a medical doctor it's pertinent and to your Honor I understand it's pertinent, but I know my client suffers from it.

Whether it's coming from Agent Orange, diabetes, the degenerative disc or just a combination of all three and the other ailments he has, he's feeling the effects of it meaning that whether the source is unknown or known, he's dealing with the effects of it. He's suffering the daily pain of these ailments.

Now—

THE COURT: Well, do you understand, Mr. Forrester, that many people suffer from diabetes, and the federal hospitalization system and the federal prison system is equipped to handle people with diabetes and many other difficult situations?

I am interested in the Agent Orange which many people do not suffer from, thank goodness, as being a possible area of looking to see what we should do in this case.

I don't mean to be ruthless, but diabetes in itself can be treated in the prison system almost as well as it can outside, and I'll [38] admit there may be some difference, but that doesn't persuade me. What may persuade me is to show what Agent Orange is doing, and I can't find it in those records.

MR. FORRESTER: Can I call Mr. Rita to the stand?

THE COURT: Is he going to be able to testify to what his symptoms are, or is he going to be able to show what Agent Orange has done?

MR. FORRESTER: He can testify to the symptoms, to the pain he's feeling and to the start date to when the symptoms came on, and I think that could probably pinpoint any general fashion concerning Agent Orange, your Honor.

THE COURT: All right. Why don't you just proffer that to me.

MR. FORRESTER: All right. Thank you. (The defendant and Mr. Forrester conferred.)

MR. FORRESTER: I'm prepared to proffer that the onset of gum disease, the rashes, the headaches were at the end of 1969.

He served—his tour in Vietnam was from 1968 to 1969. At the end of that tour he started to have gum disease, rashes, headaches, [39] migraines, and after that tour he was about the age of 23, and there's no history of diabetes, at least Type 2 diabetes or any sort of diabetes in his family. He started to have symptoms of that soon thereafter. I would suspect that about age 24, 25, your Honor.

THE COURT: Well, all right. Are those symptoms from the fallout from Agent Orange?

MR. FORRESTER: Yes, sir.

THE COURT: Do we have some medical evidence of that?

Does he anywhere have a letter at any time from a doctor who has examined him and said you have, or does he have anything to show that he was a victim of Agent Orange, induction of Agent Orange, and if so, does he then have any medical evidence that would say Judge, you should un-

derstand that these are the results he's having from Agent Orange and therefore you—forget the last point.

MR. FORRESTER: Your Honor, I'll say this: We signed a waiver of the Rule 32 procedure, and in signing that, I went over and I said with Mr. Rita we can send away for all this information and, you know, it might take [40] longer than June 7th before we get them, however, I know that these ailments are going to be in your pre-sentence report, and usually that's why we go over and say do you accept what's in the pre-sentence report.

In paragraph 55 I believe, which is page 9, they're all here.

THE COURT: Okay. Do you want me to accept that as his medical?

MR. FORRESTER: Yes, I do, your Honor.

THE COURT: Mr. Martens, what do you say about that?

MR. MARTENS: I have no objection at this time, your Honor.

THE COURT: I'll accept that as the medical.

MR. FORRESTER: Thank you, your Honor.

THE COURT: Anything else that you want me to take into consideration?

MR. FORRESTER: Not by with consideration, but just wanted to say thank you to Mr. Martens. He—I understand that he had gleaned over whether to file a motion for upward departure. He hasn't, and we say to the Government thank you.

[41] THE COURT: Mr. Martens, do you wish to be heard on. an appropriate disposition here?

MR. MARTENS: If you want to hear from me at this hour, I would.

THE COURT: Well, we're going to start again at nine o'clock in the morning. If you feel more prepared at that time, I'll hear you then but—

MR. MARTENS: I'm plenty prepared.

THE COURT: All right.

MR. MARTENS: Whatever the Court wants.

THE COURT: Let's go.

MR. MARTENS: I guess I'd start by saying this: I think a lot of people, I think unfortunately a lot of even U.S. Attorneys' Offices don't view obstruction and perjury and crimes of that sort as things worthy of effort and time in pursuing, and I happen to actually strongly disagree with that perspective.

In fact, if you can believe it, Mr. Rita is the first of five obstruction or perjury prosecutions that I've brought or am about to bring in the last year.

It seems to be that people think that when you take an oath you can say whatever you [42] want whether it's true or not.

Mr. Rita appeared before the grand jury in the course of when this U.S. Attorneys' Office most important investigations involving the smuggling of fully automatic machine guns, thousands of them into the United States and selling them to people around the country, many of whom were convicted felons or violent people.

It was an important investigation of this office, and Mr. Rita was called because his name came up during the investigation. I know some of this was recounted back at the time of the trial.

Mr. Rita was not a target at the time. He would never have been a target as far as I'm concerned if he had simply told us what he knew.

What we were trying to get at at the time was whether or not the company under investigation known as InterOrdnance was obstructing our investigation by telling buyers of these firearms parts kits, which were essentially machine guns, not to cooperate with the Government and not to hand over the guns.

[43] Mr. Rita was one of those purchasers, and he spoke with an ATF agent who asked him if he would return his parts kit.

Immediately after getting off the phone with the agent, he got on the phone with InterOrdnance and spoke for I believe about seven minutes in the telephone call.

We simply wanted to know what happened after you got off the phone with the agent that caused you ultimately not to give your parts kit back to the ATF agent.

I spent as much time as I could, asked as many questions as I could in the grand jury giving Mr. Rita every opportunity to tell the truth to tell us what happened, and he answered he had not spoken with InterOrdnance after speaking with the ATF agent, and that was simply false because I obtained his telephone records thereafter, and within an hour and a half of speaking with the ATF agent, he was on the phone for a lengthy call with InterOrdnance.

It is unfortunate at the end of the day that Mr. Rita is here and has become a target of this investigation because that was never [44] intended. We simply wanted his help as a sitting law enforcement officer himself at the time in helping us prosecute what we believe was a dangerous company engaged in dangerous activity.

He was a law enforcement officer, and it's unfortunate—and it's even more unfortunate that he was a law enforcement officer after having previously been convicted, because if you review the pre-sentence report, you see that this isn't the first time Mr. Rita has lied when it comes to firearms, but back in

the '80s he was convicted while a law enforcement officer of lying on firearm permit applications.

Somehow, and it escapes me, I even know the AUSA who prosecuted Mr. Rita. It turns out by happenstance he's a friend of mine living in the New York City area where I grew up.

I called him and talked about this case, and no one can seem to explain but for whatever reason Mr. Rita got a second chance as a law enforcement officer even after his prior trial and conviction on making false statements on firearm applications.

[45] You would have thought if anyone knew the importance of telling the truth, that given Mr. Rita's prior convictions, given his years of service as a law enforcement officer, given I believe he testified in grand jury he knew about the 1001 statute, given his work as an asylum officer, if anybody should have known the importance of telling the truth, you would have thought that Mr. Rita did, yet he persisted repeatedly in providing false answers to the grand jury.

He was very belligerent, in fact, in the grand jury in his attitude because he viewed I didn't want to accept his answers when in fact it turns out that I was right, his answers were false, and the jury itself, not just the grand jury, but the jury agreed.

Mr. Forester is right. I actually gave consideration to filing an upward departure motion under 5K2.7 which allows an upward departure for significant disruption of the governmental function because I have concern, and we've already taken steps with the U.S. Attorneys Office in Miami to go back and see whether or not because of Mr. Rita's perjury [46] conviction that there's any defense counsel perhaps in any of the cases that he was involved with that we might need to notify.

When I initially got the statement that he submitted to probation, it said he had testified earlier this year. Unfortunately, this statement wasn't dated, and I wasn't clear if that was earlier in 2005 or earlier in 2004, and we still have the U.S. Attorneys' Office down there just attempting to locate whether there are any cases.

But I decided, you know, I'm not here to pile on. I didn't want to make a motion for an upward departure. But I do feel strongly that what Mr. Rita did was not an innocuous crime. It was not a trivial matter.

Our system only works—and you know this better than me obviously—that our system only works when people tell the truth. That's what our system is built on. That the oath means something. That it's not just a perfunctory matter that we have to get out of the way before somebody takes the stand.

Mr. Rita—if anybody knew it, Mr. Rita knew it, yet he chose to lie in the grand jury, [47] and as a result, we're here today.

I would ask this Court to take Mr. Rita's prior history into account, not just his prior sickness or prior military service. I commend anyone who served in Vietnam or in the Gulf War, but to take his history as a law enforcement officer and hold it against him because if anybody should have known how to behave in a grand jury, Mr. Rita should have known.

Thank you.

THE COURT: All right. Thank you, sir.

Mr. Rita, you're not required to say anything at this point, and if you elect to say nothing, that fact will not be held against you. However, this is a serious matter to you, I suspect. It is to the Court.

If there's anything you want me to hear from you in addition to what your attorney has said on your behalf, Mr. Forrester, I'd be glad to hear from you.

THE DEFENDANT: Yes, sir. There is a certain amount of nervous on my part.

THE COURT: I suspect so. I would be, too.

[48] THE DEFENDANT: There is a certain amount of mixed emotions.

I want to clear up some points that I think need to be cleared up, and then I'd like to more or less tell you what I feel at the end and that will be my finishing statement.

The medical information and the documents that you were reviewing earlier, your Honor, those were documents provided to me by the pre-sentencing officer requesting certain information. The information was provided to the pre-sentencing officer with the documents requesting it.

I don't think you were supposed to see those. I think you just were supposed to see the end result. So I can understand why there's a certain confusion not understanding why those documents were given to you.

My medical condition dates back to when I was in Vietnam and started getting more and more noticeable several years after I left.

Initially right there in Vietnam I started getting skin rashes. I started getting gum disease. I started getting headaches, digestive problems and all that.

[49] That is documented, but I believe that's what the military medical records that go back to 1968 to '69. If I thought they were important at the time, I probably would have requested them under the Freedom of Information Act. I didn't know I needed to do that.

I thought I was complying with the Court's request by providing at least a year and a half of my medical records—my complete medical history records to, you know, show my point about my illnesses and all that.

Everything that's in that one fold of document that Mr. Forrester gave you is a compilation of all the medicines, all the machinery, everything I have to do. There is no final draft or anything on it, but if you go through the medical records it will support each individual prescription, each individual procedure that I'm supposed to take and everything.

As far as being a law enforcement officer, I was originally a criminal investigator for Immigration. That was from 1978 to 1986 when I was terminated because of the problem I had with the courts because of [50] the wrong address being used on firearm applications.

I agree with Mr. Martens one hundred percent. I did respect and cherish the opportunity to have a second chance, even though I felt I was unduly terminated and charged with lying on the documents, but I appreciate it.

I love my family. I consider myself a family man. I would not lie to save myself any embarrassment or anything. So because of this second chance, it would be even less reason for me to do anything out of the ordinary.

In this particular case, sir, there are several victims here: Myself, the Court, and my family.

The Agent Levin perjured herself—

THE COURT: Now, wait a minute. Before you get into that—

THE DEFENDANT: Yes, sir.

THE COURT: —indicating that you love your family and your children.

THE DEFENDANT: Yes, sir.

THE COURT: When have you last seen your children?

[51] THE DEFENDANT: Well, they left me off at the airport when I came over here at 10:30 this morning, sir.

THE COURT: This says that you've had no contact with your children in about 20 years.

THE DEFENDANT: That's my previous family, sir. I'm divorced and remarried.

THE COURT: All right. So those children you have no contact with?

THE DEFENDANT: No, sir. The sad part of is it my original first wife turned the children against me and they didn't want to have any contact with me at all. That's why I cherish my family now more so.

THE COURT: Now back to the agent testifying falsely against you. Remember, that a jury has heard that now.

THE DEFENDANT: Yes, sir.

THE COURT: And has made a decision.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Proceed.

THE DEFENDANT: They may have made the decision, but that doesn't change the fact that she perjured herself, sir.

Secondly, to be civil and to give [52] Mr. Martens the benefit of the doubt, I believe he may have initiated a modern day version of the inquisition. He was so tied up with this major case that he forgot to actually look at what was going on. In his mind I was guilty and that was it, period. No matter what I said, what I did, I was guilty.

It bothers me that my family is going through this. It bothers me that I have to be before you here today.

I don't know if Mr. Martens is an evil man. I don't know if he has lost sight of this project that he was doing. All I know is that I'm the victim, sir.

I did not lie in the grand jury.

There was a question of one part of the testimony that I think may be the whole crux of this whole thing here is that I made phone calls.

When Mr. Martens was making his presentation now, as he did during the trial, he admitted the fact that I made the phone call. I admitted making the phone call about the RPK kit, not about the PPSH kit which is the one that was in question. And then my [53] grand jury testimony when I said I did not call the company, I did not call the company about the PPSH kit.

THE COURT: Remember, now I'll hear you, but this is a question of what to do, not a question of whether the jury did right or not. That's been decided.

THE DEFENDANT: Well, the jury—

THE COURT: This is a question of what to do on the things that Mr. Forester has asked us to give consideration to.

Proceed.

THE DEFENDANT: From what Mr. Forester has told me, that this is my opportunity to be heard, and it's been bottled up in me. I'd like to make my emotions and my feelings and my thoughts made to the Court.

I'm innocent. I will try to the best of my ability to try and appeal this case.

I understand there's two parts to it; there's the sentencing part and then there's the actual conviction itself.

THE COURT: Right.

THE DEFENDANT: Mr. Martens said there's nothing to appeal until you're actually [54] convicted. So I'm not addressing that at this point. The actual conviction itself to overturn that I will try that now.

I think one of the contributing factors to my inability to have a proper defense was the lack of funds, lack of money,

location, having to come up here. I'm currently in about $30,000 worth of debt as a result of this.

THE COURT: As a result of this case?

THE DEFENDANT: Yes, sir.

THE COURT: Well, you seem to have a pretty good cash flow.

THE DEFENDANT: No, sir. That was when I was working. After I retired, it went down to zip.

Right now I get about $2,000 a month money from my retirement. I get about $600 from my disability which I have—the VA has recognized about 40—about 50 percent disability at this point, and the little money that I make as a dispatcher at night. So I don't have these funds available.

THE COURT: So you don't get $1,156 a month?

THE DEFENDANT: No, sir.

[55] THE COURT: And you don't get spouse's salary of $1,698?

THE DEFENDANT: That would be her salary, yes, sir.

THE COURT: Okay. And federal annuity of $2,009?

THE DEFENDANT: Yes, sir.

THE COURT: Sir?

THE DEFENDANT: Yes, sir.

THE COURT: And Veteran's pension of $612?

THE DEFENDANT: Yes, sir.

THE COURT: So you and your wife would have $5,400.75 a month?

THE DEFENDANT: I haven't done the figures, but that sounds about right, sir.

THE COURT: And your expenditures are approximately $4,500 a month?

THE DEFENDANT: Some months more, some months less.

THE COURT: So that would leave you a monthly cash flow of approximately $950 or a little less?

THE DEFENDANT: Again, without doing the numbers. I know I had to sit down diligently [56] with my wife and try to come up with some sort of exact representation of what our bills were and all that, but things have gone up and gas has gone up.

THE COURT: And then coming up with that figure for meals, groceries and lunches, $1,500 a month for the two of you?

THE DEFENDANT: No, it's the four of us, sir.

THE COURT: For the four of you.

THE DEFENDANT: It's four of us, plus I help out my mother-in-law as well. She's in an old age home, but I help out as much as I can.

THE COURT: All right. Proceed.

THE DEFENDANT: So I do regret being here today, and like I said, between mixed emotions I find it very—it's unbelievable that an innocent man could be facing a judge at this point in this situation.

And again, I—you know, I don't know if Mr. Martens is an evil man or not. I don't know if he's just losing sight of this thing, or if I just fall into the cracks. I just don't know. All I know is I have told the truth from day one.

[57] Mr. Forester has brought up some things that may have contributed to this misunderstanding from my original attorney, but I'm here today. I will do the best I can to try to

prove my innocence regardless of whatever you decide to do today, sir.

It just offends me that my family is being put through this for no reason at all other than someone going on an inquisition, and I just happen to meet the criteria that they wanted.

THE COURT: Okay.

THE DEFENDANT: I thank you for your patience and I thank you for your diligence because I can see you're actually listening to me and it's not going over your head. You're actually listening to me, and I appreciate that considering this is the first time I really had a chance to say anything.

If there's any questions or documents—just one other thing. The cards, the business cards that I gave to Ms. Kay was for her to independently verify that in fact I've worked with these agencies and involved in hijackings and kidnappings and murders on behalf of the [58] Government and testified against people who have been incarcerated, people who have been returned back to their countries, and I take personal offense that he's painting a brush, he's painting a brush on my testimony for the cases I did for the Government as being questioned at this point.

THE COURT: No. You'll have to—from my perspective, Mr. Martens did not address the work that you say you had done for the other agencies. I'm the one who held that up and said I see these cards here, but that doesn't tell me anything.

I think my comment at that point was I don't know whether he helped to find seven terrorists or whether he gave some information that they need to clean up their act in the FBI, but that was not to say anything except I couldn't make anything from the fact that I had these cards in front of me.

THE DEFENDANT: No. I would specifically refer to the grand jury subpoena issued by the U.S. Attorney in the case that he's questioning or painting a brush that—

THE COURT: Oh.

[59] THE WITNESS: —my testimony there might have been questionable.

As far as terrorists, yes, I have, I've assisted in incarcerating and identifying terrorists, spies, illegal aliens, drug dealers, smugglers, rapists, child abusers as a non-law enforcement officer with the U.S. Government and Immigration. An Immigration asylum officer is not a law enforcement officer.

THE COURT: Okay.

THE DEFENDANT: Okay? That's another sore point with me on that.

Mr. Martens purposely misled the grand jury—the trial jury and the Court in that I was a law enforcement officer when he knew all along that I was not a law enforcement officer, and there's testimony in the grand jury to that effect that he knows I am not a law enforcement officer, yet he repeatedly uses that for special effect to make things worse than what they really are.

I am familiar with 1001. I am familiar with testifying before a grand jury, and I assure, your Honor, you know, words can only go [60] but so far. I wish you could look into my heart and see for yourself.

I did not falsely testify before the grand jury. If anything, I told them exactly what was going on and exactly what happened. And again, if it wasn't for the perjured testimony by Agent Levin and Mr. Martens running with that, there would be no reason why I would be here today.

At any point I would have assisted the Government in any criminal investigation whether I was an investigator or law enforcement officer or not. I was never asked. I was never approached, and I would have been more than happy to help if I could have.

THE COURT: All right.

THE DEFENDANT: I think the day is late. I don't want to go on past. I think I've gotten my point across to the Court.

I thank you, your Honor.

THE COURT: All right. Thank you very much. I appreciate your comments, Mr. Rita.

MR. FORRESTER: Your Honor, if I can just say, not to belabor any point, but as you've heard my client say, he's taken this very [61] personally.

THE COURT: I'm sure he has.

MR. FORRESTER: I just want to say on behalf of myself and my client that even though you've heard some things that might be slanderous to the U.S. Attorney, I will say this: I've discussed with Mr. Rita certain actions he could have taken. I said, you know—meaning as far as subpoenaing records, change continuing the date, at least file a motion to continue this date until we get those records, and I say that to say as facetious as his personal statements might be, he's certainly one that's not necessarily I would call a loose canyon. He's just one deeply hurt by things.

I would say this: I don't think Mr. Martens is an evil person. However, the fact is that we went to trial, we lost, and he's hurt.

If you could do this: There is going to be a sentence. He lives in the Miami area. Obviously a federal institution in that area and self-surrender would be appropriate, your Honor.

[62] THE COURT: All right. Thank you, sir.

The Court has reviewed the sentencing guidelines with respect to the charges here of Title 18 of USC 1623, making a false declaration, 18 USC 1001 and 1503, and the Court finds those to be serious matters.

The Court is not able to evaluate the seriousness of the criminal investigation which was going on of which the Government considered Mr. Rita to have some important testimony and felt that Mr. Rita did not give truthful testimony to.

The Court is unable to find that the sentencing guideline range which is set forth there that we've already discussed is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true, and I must accept as true the jury verdict that Mr. Rita violated the laws that he is accused of violating, all five of them.

So the Court finds that it is appropriate to enter the following sentence: It is adjudged that Mr. Rita should be committed to the custody of the Bureau of Prisons for a [63] period of 33 months.

It is further ordered that upon—that's on all of the counts and it should be concurrently running.

Upon his release from imprisonment, he shall be on supervised release for a period of three years on each of the counts, and they should run concurrently with each other.

The Court has reviewed the imposition of a fine and while it finds that Mr. Rita probably does have a sufficient income from his wife and his own income so that he has some cash flow, out of an abundance of caution and care about this Agent Orange business which may cause some of the problems, the Court will not impose a fine as to Mr. Rita.

There is a special assessment of a $100 on each of the five counts which will be due and payable.

Can that be paid, Mr. Forrester?

MR. FORRESTER: Yes, your Honor.

THE COURT: When can that be paid?

THE DEFENDANT: Now.

MR. FORRESTER: I believe he has the money on him right now.

[64] THE CLERK: The Clerk's Office closed at four, and they already closed out the money for the day.

THE COURT: Okay. Mr. Forester, it's not necessary for him to be here, but you may bring that money tomorrow. Today is Tuesday.

MR. FORRESTER: Yes.

THE COURT: That should be paid in the offices of the clerk by tomorrow afternoon. Is that all right?

MR. FORRESTER: Thank you.

THE COURT: Four o'clock. Before that time tomorrow afternoon.

The conditions of supervised release are as follows: One, he shall abide by the standard conditions of supervised release and—well, Ms. Kay, is there anything else that you feel that's appropriate, specifically in this case other than the general conditions of probation or supervised release?

PROBATION OFFICER KAY: No, sir. We may want to recommend the BOP to adhere to his medical needs.

THE COURT: I'm going to do that in just a moment.

[65] PROBATION OFFICER KAY: Okay. Then that's it.

THE COURT: All right.

The Court recommends that Mr. Rita—based on the number of complaints which he has, which may be very valid complaints, the Court recommends to the Bureau of Prisons that it afford him an opportunity to be housed in an institution where he can receive the medical treatment and medicines which he is required to take.

So the Court urges the Bureau of Prisons to give careful attention to the condition of Agent Orange or any other condition which Mr. Rita may be affected in sentencing him—in housing him in an appropriate institution.

Because Mr. Rita is from the Miami area and because of the medical condition which he has raised, the Court first of all and primarily recommends that he goes to an institution where he can get this medical treatment, this help, but secondly, if it can be, that he be housed in an institution in the Southeastern part of the United States which is a little closer to his home base than North [66] Carolina might be, but that's a secondary request.

Mr. Martens, is there anything else you wish me to address here?

MR. MARTENS: No, sir.

THE COURT: Mr. Forester, is there anything else you wish me to address here?

MR. FORRESTER: Just to reiterate the point about self-surrendering, your Honor.

THE COURT: Any objection to that, Mr. Martens?

MR. MARTENS: Not at all.

THE COURT: The defendant shall report to the institution to which he's assigned for service of this sentence on or before—five weeks would be what? July the 12th, 2005, on or before twelve o'clock noon on that day.

You will be assigned an institution and you will report directly to that institution—

THE DEFENDANT: Yes, sir.

THE COURT: —Mr. Rita.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Anything else?

Now, Mr. Rita, you may know this already, but listen to me anyway.

[67] You have an absolute right to appeal everything that has taken place in this case. Talk to Mr. Forester and listen to what he has to say, but in the final analysis you must make up your own mind about what you want to do.

If you decide that you want to appeal and cannot pay an attorney to represent you, then one would be appointed for you. In view of the financial statement that we have here, I don't know whether you are eligible or not, but you certainly would be considered if you asked to be.

Listen to what he has to say and then make up your own mind, and if you are found to qualify, then the Court will appoint an attorney to represent you without cost to you.

If you're going to appeal, you got to get that notice in within ten days of the entry of this judgment or you lose that right.

Now, is there anything else that I just said about an appeal that you do not understand?

THE DEFENDANT: Again, I believe there's two appeals we're talking about here; the appeal of the sentence that you're providing me [68] now and then there's appeal of the conviction itself.

THE COURT: All of that is part of the same appeal. So there's one appeal raising at least two issues.

THE DEFENDANT: I would ask the Court then to help me provide legal counsel because I can no longer retain Mr. Forester, and I've notified him in writing to that effect.

THE COURT: You may file such a motion. First you would want to file—if you decide to appeal, you would want to file your notice of appeal. Then you may make an application. I won't hear that. It will be heard in Charlotte.

Some other judge will hear it either here or in the Fourth Circuit and decide whether to appoint an attorney or not.

So you understand what your rights are?

THE DEFENDANT: Yes, sir, but I'm not sure of the mechanics on it. I have a ten day period to file an appeal?

THE COURT: From the date that I sign the judgment.

THE DEFENDANT: And that will be as of when?

[69] THE COURT: Whenever it gets to me, which may be a week or two.

THE DEFENDANT: All right, your Honor.

MR. FORRESTER: Your Honor, I think I've told my client that I would file the notice of appeal.

THE COURT: Okay.

THE DEFENDANT: But that's not the appeal itself?

THE COURT: That's the notice. Then you got to ask for an attorney. If you're going to ask for an attorney, then the Court will make a decision on whether you're entitled to have appointed counsel.

THE DEFENDANT: All right, Judge.

THE COURT: And then the appeal will go forward from there.

All right. Thank you very much. I apologize for holding you all here this afternoon so long, but thank you very much.

All right. Let's recess Court.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed JUN 18, 2005]

DOCKET NO. 3:04CR105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.,
Defendant/Appellant.

NOTICE OF APEAL

NOW COMES the Pro Se Defendant, Victor A. Rita, Jr., and respectfully gives notice of is claim of appeal to the Court of Appeals for the Fourth Circuit from the judgment and sentence entered in the above-captioned case. I have exhausted funds from my savings for the cost of attorney's fees and travel related expenses to contest this matter at the trial level. This Pro Se Appellant respectfully requests this Honorable Court to waive filing fee and also appoint counsel to assist him in this direct appeal.

This the 17th day of June 2005.

/s/ Victor A. Rita, Jr.
VICTOR A. RITA, JR.
Pro Se Defendant
1395 NE 132nd Street
North Miami Beach, FL 33161
(305) 893-7115

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

[Filed JUN 27, 2005]

File Number CR-04-105

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

NOTICE OF APPEAL

Notice is hereby given that Victor A. Rita, Jr. (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the Fourth Circuit, Richmond Virginia, entered in this action on the day of 21 June, 2005.

(s) Victor A Rita, Jr

Attorney for (In Forma Pourperis)

Address: 1395 North East 132nd Street
North Miami FL. 33161

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* See Rule 3(c) for permissible ways of identifying appellants.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

[Filed JUL 1, 2005]

Case Number: 3:04CR105
USM Number: 19614-058
Denzil H. Forrester
Defendant's Attorney

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

__ Pleaded guilty to count(s).
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984, *United States v. Booker*, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 6/7/05

_____
Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: /s/ William L. Osteen
July 1, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.*

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.

2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ At __ On __.

__ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 12:00 noon on July 12, 2005.

__ As notified by the United States Marshal.

__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Counts 1 - 5: THREE (3) YEARS each count to run concurrently.*

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term

of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$500.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $____ Due immediately, balance due

__ Not later than _____, or

__ In accordance __ (C), __ (D) below; or

B X Payment to begin immediately (may be combined with __ (C), __ (D) below); or

C __ Payment in equal _____ (E.g. weekly, monthly, quarterly) installments of $_____ To commence ____(E.g. 30 or 60 days) after the date of this judgment; or

D __ Payment in equal ___ (E.g. weekly, monthly, quarterly) installments of $_____To commence ___ (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

[Filed AUG 30, 2005]

Case Number: 3:04CR105
USM Number: 19614-058
Denzil H. Forrester
Defendant's Attorney

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

__ Pleaded guilty to count(s).
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984, *United States v. Booker*, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 8/15/05

/s/ William L. Osteen
Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: August 30, 2005

Amended to remove report date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.*

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.

2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ At __ On __.

__ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ As notified by the United States Marshal.

__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Counts 1 - 5: THREE (3) YEARS each count to run concurrently.*

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term

of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$500.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $____ Due immediately, balance due

__ Not later than _____, or

__ In accordance __ (C), __ (D) below; or

B X Payment to begin immediately (may be combined with __ (C), __ (D) below); or

C __ Payment in equal _____ (E.g. weekly, *monthly*, quarterly) installments of $_____ To commence ____(E.g. 30 or 60 days) after the date of this judgment; or

D __ Payment in equal ___ (E.g. weekly, monthly, quarterly) installments of $_____To commence ___ (E.g. 30 or 60 days) after release from impris0 onment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 05-4674

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR A. RITA, JR.,
Defendant-Appellant.

Submitted: April 27, 2006
Decided: May 1, 2006

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. William L. Osteen, *District Judge*. (CR-04-105).

Before NIEMEYER and MOTZ, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

PER CURIAM:

Victor A. Rita appeals his jury conviction and sentence on charges of perjury, obstruction of justice and making false statements, in violation of 18 U.S.C. §§ 1623(a), 1001(a)(2), and 1503 (2000), respectively. Rita's sole issue on appeal is whether the sentence imposed by the district court was reasonable. Finding no reversible error, we affirm.

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a sentencing court is no longer bound by the range prescribed by the sentencing guidelines. *See United States v.*

Hughes, 401 F.3d 540, 546-47 (4th Cir.2005) (noting after *Booker*, sentencing courts should determine the sentencing range under the guidelines, consider the other factors under § 3553(a), and impose a reasonable sentence within the statutory maximum). However, in determining a sentence post-*Booker*, sentencing courts are still required to calculate and consider the guideline range prescribed thereby as well as the factors set forth in 18 U.S.C. § 3553(a) (2000). *Id.* We will affirm a post-*Booker* sentence if it is both reasonable and within the statutorily prescribed range. *Id.* at 546-47. We have further stated that "while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range." *United States v. White*, 405 F.3d 208, 219 (4th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 668, 163 L.Ed.2d 539 (2005). Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" *United States v. Green*, 436 F.3d 449, 457 (4th Cir.2006) (citing *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir.2005), *cert. denied*, ___U.S. ___, 126 S.Ct. 1455, 164 L.Ed.2d 151, 2006 WL 271816 (2006)).

We find that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. The court sentenced Rita only after considering the factors set forth in § 3553(a). Based on these factors, and because the court sentenced Rita within the applicable guideline range and the statutory maximum, we find that Rita's sentence of thirty-three months' imprisonment is reasonable.

We therefore affirm Rita's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: May 1, 2006]

No. 05-4674
CR-04-105

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR A. RITA, JR.,
Defendant-Appellant.

JUDGMENT

Appeal from the Unites States District Court for the Western District of North Carolina at Charlotte

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

976B (3)

No. 06-5754

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in the Joint Appendix at J.A. 112-113. It is also available at 177 Fed. App'x 357, 2006 WL 1144508.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 1, 2006. J.A. 114. The petition for a writ of certiorari was filed on July 28, 2006, and granted on November 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a) & (c), 3661; 28 U.S.C. §§ 991, 994, and of the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), are included as an appendix to this brief.

STATEMENT OF THE CASE

Victor A. Rita, Jr., a father and a distinguished veteran of two foreign wars, was sentenced to a lengthy term of imprisonment based on two statements made to a federal grand jury. The subject of the grand jury's investigation was InterOrdnance of America, Inc., a licensed firearms retailer. J.A. 16; Sealed J.A. 119. Agents with the Bureau of Alcohol, Tobacco and Firearms (ATF) determined that one of the products offered by InterOrdnance – a "parts kit" for a "PPSH 41," a vintage battle rifle used by various militaries during

World War II[1] – should be classified as a "machine gun" and restricted from sale under federal law. J.A. 18-19; Sealed J.A. 119. Mr. Rita had previously purchased one of these kits, and was called to testify before the grand jury as to his interactions with company representatives. J.A. 18-19.

During his testimony, Mr. Rita was asked whether he had spoken with representatives of InterOrdnance after being contacted by the ATF concerning the recall of PPSH kits. He replied no. J.A. 10; Sealed J.A. 119-22. He was then asked whether the ATF had requested that he surrender his PPSH kit. He replied no. *Id.* The government contended that this information conflicted with telephone records and statements obtained by investigating ATF agents. Sealed J.A. 120-21.

These two brief exchanges gave rise to a five-count indictment against Mr. Rita: two counts of making false declarations in violation of 18 U.S.C. § 1623(a), two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2), and one count of obstructing justice in violation of 18 U.S.C. § 1503. J.A. 7-13. Mr. Rita argued, during a two-day jury trial, that his answers before the grand jury were sincere and responsive to the questions asked. J.A. 42, 80-81, 85. The jury, however, returned a verdict of guilty on all counts. J.A. 2; Sealed J.A. 121-22.

A presentence investigation report was prepared in advance of sentencing. Sealed J.A. 116. It advised that Mr. Rita should be assigned no criminal history points, that his base offense level should be 14, and that no aggravating characteristics were present that might warrant an upward adjustment under the United States Sentencing Guidelines.[2] Sealed J.A.

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[1] A "parts kit" is a collection of components that may be assembled into a replica – generally inoperable – of the subject firearm. J.A. 41.

[2] *See U.S. Sentencing Guidelines Manual* §§ 2B1.1, 2J1.2, 2J1.3 (2004) ("*Guidelines*"). The offenses of conviction were grouped for Guidelines purposes, and the highest offense level (14) was applied. *See id.* §§ 3D1.2, 3D1.3.

123-26. Nevertheless, the report asserted that the offense level should be increased from 14 to 20 based on a Guidelines cross-reference directing that Mr. Rita was an "accessory after the fact" to supposed violations *by InterOrdnance* of 22 U.S.C. § 2778(b)(2), which prohibits the import and export of certain firearms.[3] Sealed J.A. 122-25. This six-level enhancement – imposed even though (i) the issue was neither submitted to the jury nor proved beyond a reasonable doubt, and (ii) the purported import/export violation by InterOrdnance was neither mentioned in the indictment nor raised in the jury instructions, see J.A. 7-13, 25-39 – doubled the range of imprisonment recommended under the Guidelines, from 15 to 21 months to 33 to 41 months. Sealed J.A. 122-25, 132-33.

Mr. Rita argued for a sentence below the recommended range, based on both the departure provisions of the Guidelines and the statutory factors enumerated in 18 U.S.C. § 3553(a). J.A. 2, 40-47. He identified three primary grounds for the request: his military and civil service, his physical impairments, and his vulnerability to victimization in prison. J.A. 40-47; see *id.* at 64-65. The record amply supports these claims.

For over 25 years, from 1966 to 1992, Mr. Rita served in the United States Marine Corps, the United States Army, and the United States Army Reserve. His service included tours of duty in the Vietnam and Gulf Wars, and he has received more than 35 awards and medals for distinguished conduct. Sealed J.A. 129; J.A. 63, 65-64. After his military career, he worked as a criminal investigator and asylum officer with the Immigration and Naturalization Service and the Bureau of Immigration and Customs Enforcement. Sealed J.A. 128-29; J.A. 63-66.

His service to his country resulted in serious physical ailments. His right foot was crushed by a vehicle during the

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[3] *See Guidelines* §§ 2J1.2(c)(1), 2J1.3(c)(1), 2X3.1.

Gulf War. Sealed J.A. 127; J.A. 70-73, 78-79. He was exposed to Agent Orange during the Vietnam War, which continues to produce skin rashes and infections that require perpetual care. Sealed J.A. 127; J.A. 70-73, 78-79.

Mr. Rita also has diabetes, which causes periodic numbness in the feet as well as memory and eyesight loss. Sealed J.A. 127; J.A. 69. He suffers from arthritis, an enlarged prostate, acid reflux, a herniated disk, and sleep apnea. Sealed J.A. 127; J.A. 68. To treat these conditions, Mr. Rita – who is 59 years old – requires a long list of prescription medications as well as a CPAP (continuous positive airway pressure) machine to assist in nightly breathing. Sealed J.A. 127; J.A. 56, 73.

His years of government service also left Mr. Rita vulnerable to victimization in prison. He was, while employed by the INS, responsible for investigating crimes and assisting in prosecutions. Sealed J.A. 129; J.A. 64-65. His duties included offering testimony and presenting evidence in open court to secure criminal convictions. J.A. 61-62. As a result of these efforts, Mr. Rita has been threatened repeatedly with injury and death. *Id.* at 45-46, 61-62.

Under binding Fourth Circuit precedent, however, the district court was prevented from giving adequate consideration to these factors. It thereby viewed itself as presumptively bound by the range recommended under the Guidelines, and so determined, without explanation, that the record did not provide an adequate basis for deviation from that range. J.A. 86-87. It offered only the following short assessment of the record:

> The Court has reviewed the sentencing guidelines with respect to the charges here of Title 18 of USC 1623, making a false declaration, 18 USC 1001 and 1503, and the Court finds those to be serious matters.
>
> The Court is not able to evaluate the seriousness of the criminal investigation which was going on of which the

> Government considered Mr. Rita to have some important testimony and felt that Mr. Rita did not give truthful testimony to.
>
> The Court is unable to find that the sentencing guideline range which is set forth there that we've already discussed is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true, and I must accept as true the jury verdict that Mr. Rita violated the laws that he is accused of violating, all five of them.

Id. The district court then imposed a sentence of imprisonment of 33 months, at the low end of the Guidelines range as enhanced by Mr. Rita's purported "accessory after the fact" status. *Id.* at 87.[4]

The Fourth Circuit affirmed the judgment in an unpublished, per curiam opinion. It held that a sentence within the Guidelines range is "presumptively reasonable" and determined, without analysis, that the district court had adequately considered the factors set forth in § 3553(a). J.A. 113.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the legal rules governing federal sentencing in the wake of *United States* v. *Booker*, 543 U.S. 220 (2005). The district court placed undue weight on the Guidelines and imposed sentence without articulating, on the record, its consideration of the factors enumerated in 18 U.S.C. § 3553(a), as plainly required by § 3553(c). The resulting sentence was procedurally and substantively unlawful.

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[4] The sentencing transcript reveals that the district court credited Mr. Rita's claims of medical problems related to Agent Orange. It requested that the Bureau of Prisons place Mr. Rita in a facility that could treat "the condition of Agent Orange or any other condition [with] which Mr. Rita may be affected" and decided not to impose a fine based on "an abundance of caution and care about this Agent Orange business." J.A. 87, 89.

The Fourth Circuit nonetheless affirmed, based on its holding that "a sentence imposed 'within the properly calculated Guidelines range ... is presumptively reasonable.'" J.A. 113. As this case well illustrates, a presumption of reasonableness for within-Guidelines sentences is an abdication of the responsibility of the court of appeals to determine if the district court undertook reasoned consideration of the § 3553(a) factors. Such a presumption relieves both the district court and the government of their obligations to explain why the sentence imposed is lawful.

As a textual matter, a presumption of reasonableness for within-Guidelines sentences is plainly inconsistent with the Sentencing Reform Act. The Act directs the district court to consider all relevant factors and to impose the sentence that, in its judgment, is "sufficient but not greater than necessary" to satisfy the enumerated purposes of sentencing. To accord presumptive weight to a single factor – the recommended Guidelines range – is to denigrate all others and disregard the plain statutory command. And consideration of the Guidelines range cannot substitute for consideration of the other factors enumerated in § 3553(a). The only manner in which a district court can honor its obligations under the Act is to give equal and independent consideration to all of the factors of § 3553(a) and exercise reasoned judgment to impose a sentence, as informed by the statutory factors, that is no greater than necessary to advance the relevant purposes of sentencing.

Nor is it permissible for a court of appeals to rely upon a presumption of reasonableness when reviewing a judgment of sentence. This Court held in *Booker* that a sentencing system that restrains the discretion of district courts to impose non-Guidelines sentences is unconstitutional, and it accordingly excised the provisions of the Sentencing Reform Act mandating adherence to the Guidelines. The Court further emphasized that the standard of review for all sentences, whether within or outside the Guidelines range, should be reasonable-

ness "across the board." A presumption of reasonableness, when applied to the review of sentences on appeal, simply resurrects the system rejected in *Booker*. Even if the presumption is technically rebuttable (though, as this case indicates, the presumption may be irrebuttable as a practical matter), such a presumption signals to district courts that their sentences are subject to two different tracks for review: practically guaranteed affirmance for sentences within the Guidelines range, and substantially increased risk of reversal for all others, particularly those below the Guidelines range. The effect is readily predictable: a *de facto* restraint on lower courts causing them to return to the pre-*Booker* mandatory Guidelines regime.

Indeed, a review of post-*Booker* decisions of the courts of appeals reveals that this is precisely what is occurring. Courts of appeals are overwhelmingly supportive of within-Guidelines sentences. The lower courts are ignoring both *Booker* and the non-Guidelines factors that the Sentencing Reform Act specifically enumerates as relevant to sentencing in favor of a controlling presumption of reasonableness for within-Guidelines sentences.

Finally, however this Court rules with respect to the presumption of reasonableness, no sentence can be affirmed unless the district court adequately explains its rationale. The Sentencing Reform Act directs that the district court must "consider" all relevant factors in imposing sentence and must provide a statement of reasons for each sentence (per § 3553(c)), regardless of where the sentence lies within the statutory range. This required explanation is the only way that appellate review can ensure compliance with the legal standards for sentencing set forth in § 3553(a). Without an explanation, there is no basis for an appellate court to conclude that the district court exercised its discretion with respect to the factors that it is required to consider under § 3553(a). Even a presumption of reasonableness cannot

validate a sentence that is not supported by the requisite statement of reasons.

All of these problems infect the sentence in this case. The district court gave controlling weight to the range recommended by the Guidelines and ignored factors that strongly supported a lesser sentence. The court of appeals compounded the error by affirming the sentence based solely upon a presumption of reasonableness, reinforcing the district court's cramped view of its discretion and violating the central tenet of *Booker*. And it did so in the absence of an adequate statement of reasons, in clear contravention of the Sentencing Reform Act. The judgment of the court of appeals should be reversed and the sentence imposed by the district court should be vacated as unreasonable.

ARGUMENT

I. THE CHOICE OF SENTENCE WAS NOT REASONABLE ON THIS RECORD.

The plain language of the Sentencing Reform Act provides unambiguous instructions for sentencing judges: A district court "shall consider" all of the factors listed in § 3553(a) and "shall impose," based on those considerations, a sentence that is "sufficient, but not greater than necessary," to satisfy the purposes set forth in § 3553(a)(2). The district court in this case ignored several relevant factors and, by defaulting to the range specified by the United States Sentencing Guidelines, failed to impose a sentence consistent with the standards set forth in § 3553(a). Mr. Rita's sentence is unreasonable and should be reversed.

A. The Plain Meaning Of § 3553(a) Requires Full Consideration Of All Relevant Factors And Imposition Of The Sentence That Is "Sufficient But Not Greater Than Necessary" To Comply With The Statutory Purposes Of Sentencing.

Section 3553(a) includes two distinct directives. The first instructs that, in assessing the appropriate punishment, district courts "shall consider" the series of factors and purposes listed in paragraphs (1) through (7). The second states that district courts "shall impose" the sentence that is "sufficient, but not greater than necessary," to satisfy the purposes set forth in § 3553(a)(2). These directives are mandatory, see *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion ...."), and the district court must comply with both statutory mandates for its choice of sentence to be "reasonable," see *Booker*, 543 U.S. at 261.

1. The first directive of § 3553(a) states that the district court "shall consider" the enumerated factors and purposes in determining the sentence to impose. This is a straightforward command. The district judge is instructed to assess and evaluate – to "reflect on" and "contemplate," see *Webster's Third New International Dictionary* 483 (1993) (defining "consider") – these matters in crafting the final sentence.

The statute permits no exception. It unequivocally mandates that the district court consider each enumerated factor and purpose. 18 U.S.C. § 3553(a). A court is no more free to ignore one of these provisions than it would be to ignore any other, or the statute altogether. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here ... the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)); see also *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors ...."). A

sentence imposed without consideration of all relevant factors and purposes of § 3553(a) is, quite simply, invalid. See *United States* v. *Johnson*, 467 F.3d 559, 563, 566 (6th Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 329-30 (3d Cir. 2006); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1110 (2006).

It is incorrect to suggest, as some courts have, see, *e.g.*, *United States* v. *Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), that considering the Guidelines range serves as a proxy for consideration of the other factors and purposes of § 3553(a). To do so is to ignore the other expressly delineated statutory factors, rendering them superfluous. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought ... to be construed that ... no clause, sentence, or word shall be superfluous, void, or insignificant."). If Congress had thought the Guidelines captured all relevant considerations, there would have been no reason to identify and list separately the six other factors in § 3553(a). Yet Congress did not only that, but it specifically mandated that courts "consider" *all* of the factors, not just the Guidelines.

The Guidelines cannot substitute for the other individualized factors listed in § 3553(a) because they are generalizations. They provide a series of arithmetical functions and tables, based on the assignment of numerical values to defined categories of conduct and defendants. The recommended range is nothing more than a product of those equations, a set of numbers reflecting the collective judgment of other individuals – not the judge presiding over sentencing – as to the typical impact and import of certain conduct in certain circumstances. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988).

These numbers do not inform the judge about the particular history or character of the defendant. They do not explain the manner in which the crime was committed, nor whether there were aggravating or mitigating circumstances. They do not

consider or determine whether the defendant would benefit from alternatives to incarceration, how the defendant's dependents might be impacted by the sentence, or address the multitude of other personal considerations that should inform the final sentence. See, *e.g.*, *United States* v. *Diaz-Argueta*, 447 F.3d 1167, 1171 (9th Cir. 2006) ("[A] number taken from a table of the Sentencing Guidelines ... [does not] take[] into account all of the relevant circumstances that the statute states that the court 'shall consider.'"); see also *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383; *United States* v. *Cage*, 458 F.3d 537, 546 (6th Cir. 2006) (Clay, J., dissenting). Accordingly, reliance upon the Guidelines range as a substitute for the other factors specified in § 3553(a) cannot be squared with the statute's prescription that the sentencing judge consider (as the very first factor mandates) the "nature and circumstances of the case and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In this regard, the statute mandates *individualized* sentencing and, as the remedial majority in *Booker* held, reduces the Guidelines' role to that of a resource to be consulted. 543 U.S. at 259-60.

Of course, district courts may no more ignore the Guidelines than rely on them exclusively. The sentencing range recommended by the Guidelines is one, but only one, of the factors that a district court must consider under § 3553(a). The range can be determined only through proper application of the Guidelines provisions, including potential departures. See *United States* v. *Fernandez*, 443 F.3d 19, 29 (2d Cir.) *cert. denied*, 127 S. Ct. 192 (2006); *United States* v. *Jackson*, 467 F.3d 834, 838-39 (3d Cir. 2006); *United States* v. *McBride*, 434 F.3d 470, 474-77 (6th Cir. 2006). A court that fails to conduct this analysis, or otherwise to consider the correct Guidelines range during sentencing proceedings, has

failed to comply with the statute. *E.g.*, *Fernandez*, 443 F.3d at 29; *Jackson*, 467 F.3d at 838-39.[5]

2. The second directive of § 3553(a) states that the final punishment must be "sufficient, but not greater than necessary," to satisfy the purposes set forth in paragraph (2). 18 U.S.C. § 3553(a). The language of command is, once again, straightforward: The penalty imposed "shall" be "sufficient" but no more than needed. *Id.* It must, as the statute instructs, be "not greater than necessary" to advance the statutorily approved purposes of sentencing. See *United States* v. *Ministro-Tapia*, No. 05-5101-CR, 2006 WL 3411410, at *3-5 (2d Cir. Nov. 28, 2006); *United States* v. *Foreman*, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006); *Jimenez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring).

The purposes identified by Congress correspond to the traditional goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation. See § 3553(a)(2); see also S. Rep. No. 98-225, at 75-76 (1983). The district court is obliged to determine, based on the facts of the particular case, the minimally adequate sentence that will advance these objectives. This is an inquiry that is peculiar to each case. Section 3553(a)(2) affords discretion to the district court to decide, based upon the facts in the record, which enumerated purpose (or purposes) best suits the case at hand and what sentence is minimally adequate to serve those purposes. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and

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[5] Most courts agree that departures remain an integral aspect of federal sentencing after *Booker*. *See, e.g.*, *United States* v. *Jackson*, 467 F.3d 834, 837-39 (3d Cir. 2006); *United States* v. *Wallace*, 461 F.3d 15, 32 (1st Cir. 2006); *United States* v. *McBride*, 434 F.3d 470, 474-77 (6th Cir. 2006). *But see United States* v. *Mohamed*, 459 F.3d 979, 985-87 (9th Cir. 2006) (stating that departures are not relevant under a sentencing regime where the Guidelines are advisory); *United States* v. *Arnaout*, 431 F.3d 994, 1003-04 (7th Cir. 2005) (same).

every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."); see also *Diaz-Argueta*, 447 F.3d at 1171; *Cage*, 458 F.3d at 546 (Clay, J., dissenting). The district court must be free to consider and weigh all relevant information to determine the appropriate punishment. Congress has so required. 18 U.S.C. § 3661.

Notably, adherence to the Guidelines range is not one of the enumerated purposes of sentencing under § 3553(a)(2). And for their part, the Guidelines themselves disavow any adherence to the enumerated purposes of punishment. See *Guidelines* § 1A1.1, at 3-4 (acknowledging that the Commission was unable to reconcile purposes of sentencing or apply them directly in crafting the Guidelines). The Guidelines range therefore may not be relied upon as an independent justification for the sentence. See *Johnson*, 467 F.3d at 563, 566; see also *Ministro-Tapia*, 2006 WL 3411410, at *3-5. Simply put, a sentence that is imposed for the purpose of complying with the Guidelines is unlawful under § 3553(a). See *Jimenez-Beltre*, 440 F.3d at 529-30 (Lipez, J., dissenting).

Presumptive reliance on the Guidelines range not only violates the plain language of the statute; it corrupts the process of independent inquiry and judgment contemplated by § 3553(a). The Guidelines are premised on policies, assumptions, and judgments that may be wholly inapplicable in a given case. Indeed, the Guidelines prohibit, discourage, or restrict the use of a wide range of factors in assessing whether a departure is appropriate – including those that are highly relevant here, military and civic service and employment history[6] – even though those matters clearly warrant considera-

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[6] The Guidelines prohibit consideration of, for example: socio-economic status, *Guidelines* § 5H1.10; substance or gambling addiction, *id.* § 5H1.4; disadvantaged upbringing, *id.* § 5H1.12; personal financial difficulties and economic pressures upon a trade or business, *id.* § 5K2.12; diminished capacity if the offense involved a threat of violence or was caused by the voluntary use of drugs or other intoxicants, *id.* § 5K2.13;

tion if a sentencing judge is faithfully seeking the minimum sentence necessary to satisfy the purposes identified in § 3553(a)(2). See *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part); see also *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006); cf. Br. of *Amicus Curiae* National Association of Criminal Defense Lawyers pt. II; Br. *Amici Curiae* of National Veterans Legal Services Program and Veterans for America. Most importantly, the Guidelines do not and cannot – indeed, were not intended by the Sentencing Commission to – reflect all of the statutory purposes of sentencing set forth in § 3553(a)(2). See Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 Fed. Sent'g Rep. 326, 326-27 (1991). See generally Breyer, *supra*.

The paramount value underlying the Guidelines is one that does not even appear in § 3553(a)(2): the desire for sentencing uniformity. See Breyer, *supra*, at 4-5, 7, 13-14; see also U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987). There is no doubt that Congress desired greater uniformity when it passed the Sentencing Reform Act, and there is no doubt that the Guidelines were promulgated to further that aim. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 230-46 (1993).

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post-sentence rehabilitation, *id.* § 5K2.19; and the aberrant nature of the offense if the defendant had any "significant" prior criminal behavior or the offense involved drug trafficking subject to a mandatory minimum, *id.* § 5K2.20. They strictly discourage consideration of age, *id.* § 5H1.1; education and vocational skills, *id.* § 5H1.2; mental and emotional conditions, *id.* § 5H1.3; physical condition or appearance, *id.* § 5H1.4; employment history, *id.* § 5H1.5; family ties and responsibilities, *id.* § 5H1.6; military and civic service, *id.* § 5H1.11; and record of charitable conduct, *id.* They also impose detailed requirements for consideration of the victim's conduct, *id.* § 5K2.10; lesser harms, *id.* § 5K2.11; coercion and duress, *id.* § 5K2.12; diminished capacity, *id.* § 5K2.13; voluntary disclosure, *id.* § 5K2.16, and aberrant behavior, *id.* § 5K2.20.

But Congress did not include uniformity as a purpose worthy of consideration by the sentencing judge under § 3553(a)(2). Rather, it set forth the traditional goals of sentencing, all of which can be furthered in a particular case only by careful attention to the particular circumstances. See *Diaz-Argueta*, 447 F.3d at 1171. Any effort to achieve uniformity in sentencing as an independent purpose cannot, under the plain language of the statute, be elevated above the goals that Congress chose to privilege in § 3553(a)(2). Giving the Guidelines range presumptive weight does just that, and thus frustrates Congressional intent.

As noted above, § 3553(a) contemplates that the sentencing judge will consult the Guidelines. But the Guidelines, properly applied, serve only as a point of reference in determining the minimally adequate sentence that achieves the statutorily approved purposes. They are a possible starting point for sentencing. They may not, however, be both beginning and end.

B. The History And Judicial Treatment Of § 3553 Confirm That The Guidelines Should Be Viewed As Merely A Single Factor To Be Considered In Imposing The Sentence That Is "Sufficient But Not Greater Than Necessary" To Satisfy The Traditional Goals Of Sentencing.

The principle of "parsimony" is central to § 3553(a), and provides the guiding directive for sentencing. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." § 3553(a). This principle, often traced to the utilitarian school of thought and cited as an influence on the Framers, holds that punishment should be no harsher than necessary to advance legitimate governmental purposes, such as rehabilitation and deterrence. Norval Morris, *The Future of Imprisonment* 60-62 (1974). See generally Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 Am. J. Juris. 97 (1994). Under the parsimony principle, the only "just" sentence is one that is derived solely from necessity.

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XIX, ch. 14, at 328 (Thomas Nugent trans., Batoche Books 2001) (1748) (characterizing all other punishment as "tyrannical").

This principle was incorporated into the Sentencing Reform Act. Feinberg, *supra*, at 326-27; see also S. Rep. No. 98-225, at 75-76. The provision that would become § 3553 was introduced in 1977. See generally Stith & Koh, *supra*. It mandated that the district court "shall impose" the sentence that is "sufficient but not greater than necessary" to satisfy the four traditional purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. *Id.* at 271-72. Any other penalty would be unlawful.

District courts were directed under the original bill to "consider" several factors in determining the appropriate sentence. 123 Cong. Rec. 13,059, 13,067-68 (1977) (statement of Sen. Kennedy). One of these was the range recommended under the Guidelines. *Id.* The bill did not, however, mandate adherence to the Guidelines. *Id.* The sponsors recognized that, under this version of the legislation, the range recommended by the Guidelines would be merely one of several considerations relevant to sentencing. See Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 Am. Crim. L. Rev. 353, 373-74 (1979), *cited in* Stith & Koh, *supra*, at 244.

This understanding was changed by an amendment to the bill, introduced to limit the discretion of sentencing judges. 124 Cong. Rec. 209, 383 (1978) (statement of Sen. Kennedy). The new language, which would become subsection (b)(1) of § 3553, directed judges to "impose a sentence within the [Guidelines] range unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *Id.* at 382-83. It was recognized that the amendment would, by mandating adherence to the recommended range, establish "the basic presumptive aspects

of the [G]uidelines." *Id.* at 383. The amendment was adopted by the Senate in 1978 and repeated in all subsequent versions of the bill, including the Sentencing Reform Act of 1984. Stith & Koh, *supra*, at 245-46.

District courts were thus faced with an internally inconsistent statute. They were directed under subsection (a) to determine and impose the minimally adequate sentence to satisfy the statutory purposes of sentencing. 18 U.S.C. § 3553(a) (2004). But, if the sentence required by subsection (a) fell outside of the Guidelines range, they were precluded from imposing it by subsection (b). *Id.* § 3553(b)(1). The only practical way to proceed in these circumstances, while giving some effect to both provisions, was to impose the sentence within the Guidelines range that fell closest to the "correct" sentence, as determined under subsection (a). See Stith & Koh, *supra*, at 246 (recognizing this "basic contradiction" in the bill). In other words, only by violating subsection (a) could courts comply with subsection (b).[7]

Booker eliminated the inconsistency by excising subsection (b)(1). 543 U.S. at 259. This Court, by removing that provi-

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[7] This problem was recognized as early as 1989, by the late Judge Edward R. Becker of the Third Circuit:

> Section 3553(a) requires – as a matter of law – that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2) – retribution, deterrence, incapacitation, and rehabilitation. Imposition of a sentence greater than necessary to meet those purposes is therefore a violation of section 3553(a). The question then becomes whether a sentence imposed pursuant to applicable guidelines could ever be greater than necessary to meet the four statutory purposes. I believe that it could.

United States v. *Denardi*, 892 F.2d 269, 275-76 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (footnote omitted); *see also, e.g.*, *United States* v. *Deane*, 914 F.2d 11, 13 (1st Cir. 1990) (reversing sentence imposed in compliance with subsection (a) as a violation of subsection (b)); *United States* v. *Studley*, 907 F.2d 254, 257 (1st Cir. 1990) (same).

sion, rendered the Guidelines "advisory" and allowed the district courts to impose a sentence that fully honors the dictates of § 3553(a) by, when appropriate, going outside of the Guidelines range. *Id.* With the artificial constraint of the Guidelines now removed, judges may impose the sentence that, in their independent judgment, is minimally adequate to satisfy the purposes of sentencing. They may, in other words, comply fully with the directive of § 3553(a). There is no longer any basis in the language of the statute to give presumptive or controlling weight to the Guidelines.

C. The District Court's Imposition Of A Within-Guidelines Sentence Was Unreasonable In This Case Because It Did Not Reflect Consideration Of The § 3553(a) Factors To Serve The Statutory Purposes Of Sentencing.

Following restrictive circuit precedent, the district court below relied upon the suggested Guidelines range to the exclusion of many § 3553(a) factors. Foremost among the neglected factors were "the history and characteristics of the defendant." See § 3553(a)(1).

The record in this case was replete with information concerning Mr. Rita's "history and characteristics." Mr. Rita devoted more than 25 years to service in the military, during which he completed tours of duty in the Vietnam and Gulf Wars and received over 35 awards and medals.[8] He served as an investigator for the Immigration and Naturalization Service, where he assisted in criminal investigations and prosecutions, despite threats on his life. He suffers from a litany of serious physical ailments, some of which result from exposure to Agent Orange. He is 59 years old; he is a parent; and

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[8] The classification of military service as "not ordinarily relevant to determining whether a departure is appropriate" under the Guidelines, *see Guidelines* § 5H1.11, does not lessen or modify the court's obligation to take it into account under § 3553(a). *See supra* note 6 and accompanying text.

he continues to be a contributing and productive member of society.

All of these facts relate to the "history and characteristics of the defendant" and should have been assessed in crafting the final sentence. Yet, the district court made no mention of them in imposing the sentence of imprisonment. It did not address Mr. Rita's service to his country, his health problems, his family circumstances, or any other relevant personal considerations.[9] This renders the sentence unreasonable.

The district court also gave no consideration to "the kinds of sentences available." § 3553(a)(3). Many alternatives to imprisonment were available in this case, including probation, fines, intermittent confinement, community confinement, residential incarceration, home detention, intensive supervision, community service, or a combination of these. See, *e.g.*, 18 U.S.C. §§ 3561, 3563, 3571. These alternatives were particularly relevant here, given Mr. Rita's distinguished career in public service, his myriad health problems, and the risk that he would be victimized in prison. Yet, contrary to § 3553(a), the district court did not discuss on the record any kind of sentence other than one of imprisonment. This too renders the sentence unreasonable.

The district court's omissions, coupled with its exclusive reliance upon the Guidelines, necessarily violated the mandate of § 3553(a). Because the district court considered only one sentencing factor – the Guidelines range – and because that factor is concerned more with uniformity than the statutory purposes of punishment, it was impossible for the district court to impose a sentence "sufficient but not greater than necessary" to achieve the purposes of punishment. And so, the district court simply imposed the minimum sentence

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[9] That the district court failed to consider the impact of incarceration on Mr. Rita's health is even more troubling in light of subsequent comments, relating to the fine to be imposed, in which the court specifically – although superficially – refers to these issues. *See supra* note 4.

within the Guidelines range. As discussed above, that is *not* the same thing as imposing the minimum sentence necessary to satisfy the traditional goals of punishment.

The district court's comments at sentencing are most telling. It stated that "[t]he Court is unable to find that the sentencing guideline range ... is an inappropriate guideline range," and then proceeded to announce a sentence within that range. J.A. 87. There can be little doubt, based on these remarks, that the district court viewed – and was compelled by circuit precedent to view – the Guidelines range as presumptively correct, as a "super-factor" that could trump all other statutory considerations and purposes. Operating under this presumption effectively eliminated the district court's burden to determine an appropriate sentence, and thereby imposed upon the parties the obligation to justify a sentence outside of the recommended Guidelines range.

Such burden-shifting contravenes the statute. Because a sentence within the range recommended by the Guidelines does not necessarily advance the traditional purposes of punishment, the parties need not justify a non-Guidelines sentence. See, *e.g.*, *Diaz-Argueta*, 447 F.3d at 1171. As discussed above, nothing in the Guidelines or in § 3553 indicates that the Guidelines range reliably produces a sentence minimally adequate to satisfy the traditional purposes of punishment. The sentence imposed in this case was premised on a fundamental misunderstanding of § 3553(a), and it therefore must be reversed as unreasonable.

Had the district court been able to exercise its statutorily mandated discretion, it would more than likely have found that the relevant factors and purposes compelled a sentence below the recommended range. See § 3553(a)(2) (defining the approved purposes of sentencing). The myriad medical conditions from which Mr. Rita suffers, particularly those stemming from his combat service, can be treated more effectively outside of a prison environment, see § 3553(a)(2)(D) (statutory purpose "to provide the defendant with needed ...

medical care"), and, to the extent that those conditions reduce his life expectancy, clearly support a lesser sentence, see § 3553(a)(2)(A), (D) (statutory purpose "to provide just punishment"). Mr. Rita's age, history of employment, strong family ties, and other personal characteristics significantly decrease the risk of recidivism; in fact, statistical data produced by the Sentencing Commission demonstrate that an individual in Mr. Rita's position is generally *more* likely to recidivate if sentenced to a term of imprisonment, rather than probation.[10] See § 3553(a)(2)(B)-(D) (statutory purposes "to afford adequate deterrence," "to protect the public," and "to provide the defendant with ... correctional treatment in the most effective manner"). Moreover, his work as a criminal investigator renders Mr. Rita unusually susceptible to victimization in prison and may require extended periods of segregation, militating strongly against incarceration. Cf. *Koon*, 518 U.S. at 112 (recognizing that susceptibility to abuse in prison may serve as grounds for departure).

The district court's default to the Guidelines sentence in this case was particularly inappropriate because of the acknowledged *absence* of information concerning the unproven claim that Mr. Rita was an accessory to InterOrdnance's offense. The district court stated at sentencing that it could not assess the seriousness of Mr. Rita's offense or its impact on

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[10] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 28-29 tbls. 9-10, 31 tbl. 12 (2004). Standards adopted by the United States Parole Commission classify Mr. Rita as having a salient factor score of 10 and as being among the least likely to recidivate. Further, the Parole Revocation Guidelines, as applied to Mr. Rita, recommend a discretionary sentence of less than ten months. *See* U.S. Parole Comm'n, *Rules and Procedures Manual* 28, 30, 38, 41, 58, 59-63 (2001); *see also* 28 C.F.R. § 2.20. These standards have been recognized by the Sentencing Commission as more adept at predicting recidivism than the criminal history calculation under the Guidelines. U.S. Sentencing Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 12 (2005).

the investigation into InterOrdnance. J.A. 86-87. Put simply, the district court acknowledged that it did not know whether the critical factor used to *double* Mr. Rita's sentence under the Guidelines was really all that important after all.[11] Yet it nonetheless adhered to the Guidelines in the face of that uncertainty, *and* in the face of all the additional facts concerning Mr. Rita that the Guidelines simply refuse to take into account, but which speak directly to the concerns identified by Congress in § 3553(a).

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[11] The lack of procedural protections accorded to Mr. Rita during sentencing is also troubling. The district judge found, simply as a matter of course and without any proof of the traditional elements of the offense, that Mr. Rita was an accessory after the fact. *See* 2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 22.03 (5th ed. 2000). The government secured a conviction based on perjury but obtained a sentence based on a more serious, separate offense that it never had to prove. The Guidelines should not be treated as presumptively reasonable when they are so easily manipulated to evade constitutional protections. *See Washington* v. *Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) ("[The defendant was] charged with one crime (assault with a deadly weapon), [but] convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments...."); *Booker*, 543 U.S. at 288 (Stevens, J., dissenting in part) (expressing concerns about "increasing a defendant's sentence on the basis of conduct not proved at trial"). To presume the Guidelines range is reasonable thus raises the very Sixth Amendment concerns that *Booker* was supposed to put to rest.

In addition, due process may be implicated when sentence-enhancing facts are not proved beyond a reasonable doubt. *Cf. County Court* v. *Allen*, 442 U.S. 140, 157 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979); *Francis* v. *Franklin*, 471 U.S. 307 (1985). Sentencing judges have recognized these constitutional concerns. *See, e.g., United States* v. *Pimental*, 367 F. Supp. 2d 143, 153-54 (D. Mass. 2005) (Gertner, J.); *see also United States* v. *Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1024-25, 1029 (D. Neb.), *aff'd*, 158 Fed. App'x 754 (8th Cir. 2005); *United States* v. *Coleman*, 370 F. Supp. 2d 661, 668-73 (S.D. Ohio 2005). Of course, whether or not a due process violation occurred, Mr. Rita's sentence was unreasonable under § 3553(a).

Properly considering all of the facts, there was no need for a custodial punishment. A term of probation, or other alternative to incarceration such as house arrest, would have amply satisfied the needs to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." § 3553(a)(2)(A). These alternatives would have fully served the purposes of deterrence in this case, as probation would have subjected Mr. Rita to conditions such as a prohibition on weapons and the possibility of being subjected to unannounced searches of his home or person. See *Samson* v. *California*, 126 S. Ct. 2193, 2202 (2006); *United States* v. *Knights*, 534 U.S. 112, 121-22 (2001).

An "unreasonable" choice of sentence, within the meaning contemplated in *Booker*, is one that reflects a misunderstanding of the relevant factors and purposes or fails to consider those matters in light of the record. 543 U.S. at 261. The sentence in this case was unreasonable for these reasons. It was imposed not as a result of the district court's assessment of the relevant factors and determination of the minimally adequate sentence, as required by § 3553(a), but as a direct consequence of the court's decision to accord controlling weight to the Guidelines range. This decision conflicts with the plain language of the statute, and renders the choice of sentence unreasonable.

II. COURTS OF APPEALS SHOULD NOT APPLY A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES.

A presumption of reasonableness for a within-Guidelines sentence, whether conclusive or rebuttable, is inconsistent with this Court's decision in *Booker* and with the plain language of § 3553(a). As demonstrated by this case, a within-Guidelines sentence provides no assurance that the district court honored its statutory obligation to "consider" all of the relevant factors and to impose a sentence "sufficient but not greater than necessary." If courts of appeals presume that Guidelines sentences are reasonable, particularly without

analysis or rationale, then there will be no mechanism to correct a district court's erroneous decision to do the same. District courts will thus effectively be encouraged to treat the Guidelines as presumptively appropriate, contrary to the statutory directive. Appellate rubber-stamping of within-Guidelines sentences was not endorsed in *Booker* and raises serious constitutional concerns. See 543 U.S. at 313 (Scalia, J., dissenting in part) (noting the risk that skewed review may "preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges").

A. Presuming Within-Guidelines Sentences To Be Reasonable Is Inconsistent With *Booker* And Raises Grave Constitutional Concerns.

This Court held in *Booker* that mandatory application of the Guidelines, in which the range of legally permissible sentences is increased based on findings by the district judge, violates the Sixth Amendment. 543 U.S. at 233. This Court cured the constitutional defect by excising 18 U.S.C. § 3553(b)(1), the provision of the Sentencing Reform Act that required imposition of a sentence within the range recommended by the Guidelines, and also 18 U.S.C. § 3742(e), the appellate review section under which the courts of appeals enforced conformity with the Guidelines. *Booker*, 543 U.S. at 260-61. The same standard of appellate review for all sentences now applies "across the board." *Id.* at 263. After *Booker*, "appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts ... in determining whether a sentence is unreasonable." *Id.* at 261. This return of sentencing discretion to the district courts, reinforced by even-handed appellate review of all sentences – within, above, or below the Guidelines range – preserves the constitutionality of the Guidelines sentencing regime.

Nothing in *Booker* suggests that within-Guidelines sentences should be afforded a presumption of reasonableness. The reasonableness standard for appellate review should apply even-handedly to the full range of sentences – both within-Guidelines and without. See *id.* at 263 ("[A]ppellate judges will prove capable ... of applying [the reasonableness] standard across the board."). Given the remedial majority's careful and unambiguous holding on this point, and the dissenters' emphasis that appellate review for reasonableness be applied uniformly to sentences across the board,[12] *Booker* makes clear that careful and even-handed appellate review is necessary to avoid the knife-edge of constitutional concern. Thus, there is absolutely no basis in *Booker* for the proposition that parties seeking to challenge a within-Guidelines sentence must bear an additional burden of overcoming a presumption in favor of the Guidelines. To favor within-Guidelines sentences by presuming them to be reasonable is to transform a sentencing system meant to be "effectively advisory" into one that is "effectively mandatory."

1. A Presumption Of Reasonableness Is Irreconcilable With *Booker*.

Reasonableness review is not a mystery: it was defined in *Booker*, and specific examples were provided. It requires appellate courts to ensure that all sentences, including those within the range recommended by the Guidelines, are reasonable in light of *all* the sentencing factors specified in § 3553(a). "[I]n determining whether a sentence is unreasonable," appellate courts should be guided, "as they have in the past," by the "numerous factors" set forth in § 3553(a). *Booker*, 543 U.S. at 261.

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[12] *See Booker*, 543 U.S. at 311-12 (Scalia, J., dissenting in part) (noting the importance for courts of appeals to "evaluate each sentence individually for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines" in order to distinguish from the "mandatory Guidelines system that the Court today holds unconstitutional").

The examples cited in *Booker* for reasonableness review, involving appeals from sentences imposed after revocation of release under the advisory policies of Chapter Seven of the Guidelines, are illustrative.[13] These cases do not afford special deference or a presumption of reasonableness to sentences imposed within the recommended range, see *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004); see also *United States* v. *Tsosie*, 376 F.3d 1210, 1218 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); nor do they require exceptional reasons to justify variances from that range, see *United States* v. *Hurst*, 78 F.3d 482 (10th Cir. 1996); see also *United States* v. *Kelley*, 359 F.3d 1302, 1304-05 (10th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1302 (11th Cir. 2002); *United States* v. *Wall*, No. 99-1626, 2000 WL 280322, at *3 (2d. Cir. Mar. 14, 2000); *United States* v. *Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998). Rather, they recognize that the advisory range, while entitled to due consideration, should "inform[] rather than cabin[] the exercise of the judge's discretion." *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004). Just as reasonableness review in the revocation context is not tethered to the advisory range, so must reasonableness review post-*Booker* remain unchained to the Guidelines.

Several courts of appeals have nonetheless concluded that a sentence within the advisory Guidelines range is presumptively reasonable because the Guidelines represent the Sentencing Commission's expert "integration" of the other factors of § 3553(a). See *Jimenez-Beltre*, 440 F.3d at 522-23 (Howard, J., concurring in the judgment); *United States* v.

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[13] *See Booker*, 543 U.S. at 262 (citing *United States* v. *White Face*, 383 F.3d 733, 737-40 (8th Cir. 2004); *United States* v. *Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1300-02 (11th Cir. 2002); *United States* v. *Olabanji*, 268 F.3d 636, 637-39 (9th Cir. 2001); *United States* v. *Ramirez-Rivera*, 241 F.3d 37, 40-41 (1st Cir. 2001)).

Johnson, 445 F.3d 339, 343-44 (4th Cir. 2006); *United States* v. *Buchanan*, 449 F.3d 731, 735-36 (6th Cir. 2006) (Sutton, J., concurring); *United States* v. *Mares*, 402 F.3d 511, 519 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005). However, the Guidelines are an inadequate proxy for the remaining factors. The structure of the statute makes clear, by explicitly listing other factors, that the Guidelines alone are not sufficient. Moreover, as discussed above, the Guidelines do not integrate the purposes of sentencing set forth in § 3553(a), do not incorporate the parsimony provision, and do not include – and in many instances actually exclude – factors that the statute requires the sentencing court to consider. See *supra* note 6 and accompanying text. The Guidelines are generalizations that may or may not be reasonable in a particular case. See *Jimenez-Beltre*, 440 F.3d at 518 ("[T]he guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases.") (emphasis omitted); *id.* at 527 (Lipez, J., dissenting) ("[T]he guidelines are inescapably generalizations [and, as such,] ... are in tension with the holistic, personalized view of the defendant required by section 3553(a)'s other factors."). Courts cannot simply assume that the Guidelines range accurately balances the purposes of the statute with respect to any individual offender or offense. That is not what the Guidelines were designed to do. They were created to amalgamate the results for a broad range of defendants whose individual circumstances will vary considerably.[14]

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[14] As one judge has thoughtfully observed:

> I ... credit the Guidelines with producing a sentence which would be reasonable upon appeal given an 'average' defendant with the background and offense circumstances in an average defendant's position. Yet, an 'average' defendant is a mathematical amalgamation which does not exist in real life, and a 'presumption' of reasonableness in the trial court or on appeal leads courts to overly rely on the rather broad generalizations inherent in the Guidelines. In sentencing, the district court is not tasked with fashioning a sentence for an average

Nor can a presumption of reasonableness be justified on the ground that a Guidelines sentence represents "the alignment of the views of the Sentencing Commission with the independent views of a sentencing judge." *Buchanan*, 449 F.3d at 736 (Sutton, J., concurring). Such an argument entirely begs the question of whether the district court's within-Guidelines sentence was reasonable in light of the other factors and the enumerated purposes of punishment specified in § 3553(a). The alignment argument produces only one result – affirmance – and such a tautological test is entirely inconsistent with the "across the board" reasonableness review contemplated by this Court in *Booker*.

2. A Presumption Of Reasonableness Raises Serious Constitutional Concerns.

A presumption that discourages courts from considering more information about the particular individual before the court "would come parlously close to reinstituting the very rigid restraints on sentencing that caused the unpruned sentencing statute to be unconstitutional in the first place." *United States* v. *Zavala*, 443 F.3d 1165, 1170 (9th Cir.), *reh'g en banc granted*, 462 F.3d 1066 (9th Cir. 2006); see also *Jimenez-Beltre*, 440 F.3d at 528 n.11 (Lipez, J., dissenting) ("[I]t would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines."). It raises serious constitutional concerns to recreate, through use of a presumption that privileges within-Guidelines sentences, the same system that was held to be unconstitutional in *Booker*. The excision of subsection (b)(1) of § 3553 salvaged the federal sentencing structure only because it restored to district courts the discretion to impose sentences outside of the range recommended by the Guidelines. *Booker*, 543 U.S.

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defendant; the court must determine an appropriate sentence for the individual defendant before it.

Cage, 458 F.3d at 546 (Clay, J., dissenting) (emphasis omitted); *see also Koon*, 518 U.S. at 113.

at 260-61. Any approach that would limit that discretion once more, rendering the range of permissible sentences again dependent on findings under the Guidelines, exposes the federal regime to the same constitutional infirmities recognized in *Booker*. See *id.* A presumption of reasonableness for within-Guidelines sentences has just this effect.

As has been noted by many commentators, and confirmed by data from the Sentencing Commission, "[a] culture of guideline compliance has persisted after *Booker*."[15] In the post-*Booker* world, the great majority of sentences imposed by district courts still conform with the Guidelines.[16] Many district courts, as in this case, have continued to rely almost exclusively on the Guidelines as the starting and ending point of their sentencing process. See, *e.g.*, *United States* v. *Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005); *United States* v. *Wanning*, 354 F. Supp. 2d 1056, 1058 (D. Neb. 2005); *United States* v. *Clay*, No. 2:03-CR-73, 2005 WL 1076243, at *1 (E.D. Tenn. May 6, 2005); *United States* v. *Peach*, 356 F. Supp. 2d 1018, 1021-23 (D.N.D. 2005).

Several district courts, however, have properly recognized that *Booker* was "not ... an invitation to do business as usual." *United States* v. *Ranum*, 353 F. Supp. 2d 984, 986-87

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[15] Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 349 (2006).

[16] According to the Commission's report examining the impact of *Booker* on federal sentencing, some 62.2% of post-*Booker* sentences fell within the Guidelines range. When within-range and government-sponsored below-range sentences are combined, the rate of conformance with the sentencing guidelines is 85.9%. U.S. Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 57, 62 tbl. 1 (2006) ("*Final Report*"); *see also* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report: 4th Quarter Release* 1 tbl.1 (2006) (reflecting similar statistics based on preliminary data through September 2006). *See generally* Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After* Booker, 43 Hous. L. Rev. 279 (2006).

(E.D. Wis. 2005). Far from engaging in "unmoored decision making," these courts have dutifully consulted the Guidelines, within the framework dictated by § 3553, in order to undertake "the type of careful analysis of the evidence that should be considered when depriving a person of his or her liberty." *United States* v. *Myers*, 353 F. Supp. 2d 1026, 1028-29 (S.D. Iowa 2005) (emphasis omitted); see also *United States* v. *Jaber*, 362 F. Supp. 2d 365, 370-71 (D. Mass. 2005) (recognizing that the Guidelines "cannot be outcome-determinative without running afoul of *Booker*"). These courts acknowledge that "under *Booker* ... the court may not calculate the applicable guideline range and then stop thinking, treating the guideline calculation as definitive." *United States* v. *McQueen*, No. IP05-10-CR-H/F, 2006 WL 3206150, at *5 (S.D. Ind. Apr. 20, 2006).

Unfortunately, although such reasoned application of the Guidelines in light of the statutory requirements is required under *Booker*, appellate standards that privilege within-Guidelines sentences will undermine the good faith efforts of district courts to comply with their obligations. A judge once, or twice, reversed for sentencing outside the Guidelines, who also notices the consistent affirmance of within-Guidelines sentences, will reasonably conclude that the "law," broadly understood to include not only § 3553(a), but also appellate decisions, all but requires him or her to impose a sentence within the Guidelines.[17]

Appellate reversals of within-Guidelines sentences are almost impossible to find. Of the 1,152 appeals of within-Guidelines sentences reviewed by Amicus Curiae New York

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[17] As one district judge in the Fourth Circuit has recently observed: "Whether you call it an appellate standard or my standard or anything else, if it's [a sentence] which doesn't fit their standard as they explain it in their opinions, then it's unlawful and I shouldn't impose it." Transcript of Sentencing Hearing at 29, *United States* v. *Raby*, No. 2:06-00017-CR (S.D.W.V. Sept. 27, 2006), *available at* www.fd.org/RabyTranscript9.27.06.pdf.

Council of Defense Lawyers, nearly 99% were affirmed. App. to Br. of Amicus Curiae New York Council of Defense Lawyers at 5 ("NYCDL App."). In only 16 of these cases did the court of appeals vacate a within-Guidelines sentence, and in only one of those did the court do so because it found the sentence to be substantively unreasonable. *Id.*

Appellate reversals of *non*-Guidelines sentences, particularly those challenged by the prosecution as below the recommended range, are much more prevalent. Of the 71 below-Guidelines sentences appealed by the government, the government prevailed in vacating the sentence 85% of the time. *Id.* at 6. In the remaining 292 cases, above-Guidelines sentences were affirmed at a rate of 95%, and below-Guidelines sentences were – when challenged by the defendant as nonetheless too severe – affirmed an astonishing 100% of the time. *Id.* at 6-7. Overall, a within-Guidelines sentence is thirteen times more likely to be affirmed on appeal than one that is outside the recommended range.[18] See *id.* at 3; see also *Final Report*, *supra*, at 30 ex. 2 (reporting similar findings).

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[18] This is not, of course, to suggest that all reversals of non-Guidelines sentences have been inappropriate. Several of these have been based on potentially valid rationales, including the district court's failure to explain the final sentence by reference to the purposes of § 3553(a), *see, e.g.*, *United States* v. *Feemster*, 435 F.3d 881, 884 (8th Cir. 2006) ("[I]n the wake of *Booker*, a court maintains a duty to explain its reasons for the sentence imposed with some degree of specificity."), or its misapplication of relevant factors, *see, e.g.*, *Wallace*, 458 F.3d at 32-33 (stating that mere generalized disagreement with the Guidelines is not a permissible justification for a sentence in a particular case). But the sheer number of non-Guidelines reversals suggests that these justifications simply serve as a means to reconstruct the mandatory regime rejected by this Court in *Booker*. Prosecution sentencing practices actively promote this recreation of a mandatory regime. *See* Mem. from James B. Comey, Deputy Attorney General, U.S. Dep't of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing 1-2 (Jan. 28, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (exhorting prosecutors to "take all steps necessary to ensure adherence to the Sentencing

The results are even more striking when the sample is limited to circuits applying a presumption of reasonableness. Appellate courts in those circuits are more likely to affirm a within- or above-Guidelines sentence and to reverse a below-Guidelines sentence. NYCDL App. 3-4.[19] The Fourth Circuit has, in fact, *never* reversed a within-Guidelines sentence (despite 201 opportunities) and has reversed *all* below-Guidelines sentences appealed by the prosecution. *Id.* at 3. District courts in these circuits have received the message: they impose below-Guidelines sentences in one-third fewer cases than courts in other circuits.[20] Moreover, whether or not a given circuit formally applies a presumption of reasonableness, all courts of appeals are routinely tethering reasonableness review in some way to the Guidelines, thereby modifying district court practice.[21]

Guidelines," and to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases").

[19] The judicial presumption of reasonableness, when applied with this bias in favor of above-Guidelines sentences, is in direct tension with the principle of parsimony embodied in § 3553(a) and takes on the character of the "minimum [G]uideline[s] system" recently proposed by Attorney General Alberto Gonzales as a *legislative* response to *Booker*. *See* Attorney General Alberto Gonzales, Sentencing Guidelines Speech (June 21, 2005), *in* 17 Fed. Sent'g Rep. 324, 326 (2005). Under this approach, the district court "would be bound by the [G]uidelines minimum" while the "[t]he guidelines *maximum* . . . would remain advisory." *Id.*

[20] *See* Fed. Pub. & Cmty. Defenders, *Difference in Rates of Below-Guideline Sentences Imposed in Presumptive and Non-Presumptive Circuits* 1 (2006), *available at* http://www.fd.org/DifferenceinRatesofBelow-GuidelineSentencesImposed1.12.05-11.27.06.pdf

[21] *See United States* v. *Moreland*, 437 F.3d 424, 432 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006) ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); *see also United States* v. *Davis*, 458 F.3d 491, 496-97 (6th Cir. 2006) (same); *United States* v. *Medearis*, 451 F.3d 918, 920 (8th Cir. 2006) (same); *Cage*, 451 F.3d at 594 (same); *United States* v. *Ture*, 450 F.3d 352, 357 (8th Cir. 2006) (same); *United States* v. *Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) (same); *United States* v. *Claiborne*, 439

Presuming a within-Guidelines sentence to be reasonable (or presuming that the further a sentence is from the Guidelines range, the less likely it is to be reasonable) places an additional burden on the district court to justify non-Guidelines sentences.[22] It requires not only an articulation of the factors and purposes considered and how those factors affected the sentence to be imposed, but also an additional explanation not called for by the statute as to why those factors are sufficient to overcome a presumption of indeterminate strength that will be applied on appeal. And, in affirming within-Guidelines sentences on the basis that there is not sufficient evidence to disprove them, courts of appeals fall victim to the classic logical fallacy of an "appeal to ignorance," or the *argumentum ad ignorantiam*: proposition A is not proved to be false; therefore A is true. See Douglas Walton, *The Appeal to Ignorance, or* Argumentum Ad Ignorantiam, 13 Argumentation 367 (1999). Presuming a Guidelines sentence to be reasonable absent proof to the contrary unduly burdens appellants

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F.3d 479, 481 (8th Cir.) (same), *cert. granted*, 127 S. Ct. 551 (2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (same).

[22] Moreover, to the extent that a district court internalizes the presumption of reasonableness, it treats the Guidelines sentence as "more than a mere starting point because it gives particular weight to the thing presumed. It would indicate that the Guideline range *is* to be used unless (by some evidentiary standard) a party can prove the contrary. That is much more than a mere consult for advice, and [under *Booker*] the Guidelines are to be no more than that." *Zavala*, 443 F.3d at 1169 (citation omitted). It has also been observed that the use of the Guidelines range as an analytic starting point (permitted but not required under *Booker*) itself privileges the Guidelines through the effects of psychological anchoring, as "judgments tend to be strongly biased" in the direction of the initial anchor where "numeric judgments are assimilated to a previously considered standard," and the "300-odd page Guideline Manual provides ready-made anchors." Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 Yale L.J. Pocket Part 137, 138 (2006), *available at* http://www.thepocketpart.org/2006/07/gertner.html (citing Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. Applied Soc. Psychol. 1535, 1536 (2001)).

with the nearly impossible task of proving a negative. As stated in one of the few (if not the only) published decision where a within-Guidelines sentence has been reversed for substantive unreasonableness, "only highly unusual circumstances will cause this court to conclude that the presumption has been rebutted." *United States* v. *Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). This high burden is placed on appellants – typically defendants – even though, as discussed above, there is no basis in the statute to presume that the Guidelines range will provide the appropriate sentence. The effect of a presumption of reasonableness is thus to allow the courts of appeals to "seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the 'appellate sentencing practice during the last two decades,'" of applying greater judicial scrutiny to non-Guidelines sentences. *Booker*, 543 U.S. at 312 (Scalia, J. dissenting in part).

Moreover, with such a presumption in place, one can hardly be confident that a district court's decision to impose a sentence within the Guidelines range represents its "independent view," as opposed to its desire to take advantage of the safe harbor created by the presumption. A presumption of reasonableness on "appellate review may coerce virtual Guidelines compliance in the ordinary run of cases [and] ... surely makes Guidelines compliance the path of least resistance." Michael W. McConnell, *The* Booker *Mess*, 83 Denv. U. L. Rev. 665, 682 (2006); see also *Buchanan*, 449 F.3d at 740 (Sutton, J., concurring) ("If I have one anxiety about the presumption, it is the risk that it will cast a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment."); *Cage*, 458 F.3d at 545-46 (Clay, J., dissenting) ("[A] presumption of reasonableness on appeal unduly pressures the district court to sentence within the Guidelines range in order to discourage review and avoid reversal."). To the extent that a district court treats the Guide-

lines as anything more than advisory, the Sixth Amendment is violated.

B. A Presumption Of Reasonableness For Within-Guidelines Sentences Cannot Be Justified On Policy Grounds.

The "effectively mandatory" sentencing regime created by a presumption of reasonableness not only contravenes § 3553(a) and the Sixth Amendment, but also disserves the policy goals of the Sentencing Reform Act. A presumption of reasonableness serves only to foster uniformity by mechanical fiat. And it does not further the reduction of unwarranted disparities in sentencing because the Guidelines themselves, if mechanically applied, foster such disparities. Moreover, by relaxing judicial scrutiny of within-Guidelines sentences, a presumption of reasonableness destroys the potential that an advisory sentencing system affords for federal judges to become active participants in the ongoing dialogue of shaping federal sentencing law and assisting in needed revision of the Guidelines.

1. A Presumption Of Reasonableness Will Not Promote Desired Uniformity In Sentencing Because Of The Recognized Flaws In The Design Of The Guidelines.

The courts of appeals that impose a presumption of reasonableness often contend that the presumption is necessary to preserve the uniformity in sentencing that Congress sought to achieve in enacting the Sentencing Reform Act. See, *e.g.*, *Jimenez-Beltre*, 440 F.3d at 522-23 (Howard, J., concurring in the judgment) ("[The Guidelines] are the only conceivable centers of gravity around which some semblance of uniformity in federal sentencing might be maintained ...."). This argument is unconvincing.

As an initial matter, the mandatory Guidelines regime fostered both unwarranted disparity and excessive uniformity. These design flaws in the Guidelines have been long-

recognized.[23] The Sentencing Commission itself concedes that it has "only partially achieved" the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 142-43 (2004) ("*Fifteen Year Report*"); S. Rep. No. 95-605, at 1161 (1977) ("[T]he key word in discussing unwarranted sentence disparities is 'unwarranted.'"). To help eliminate unwarranted disparities inherent in the design of the Guidelines, federal judges were given the job of tailoring individual sentences as necessary to serve the purposes set forth in the Sentencing Reform Act, with some discretion to take account of factors not adequately considered in the Guidelines. Importantly, Congress said that "the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender," and that "[t]his will assure that the ... sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature." S. Rep. No. 98-225, at 52-53. However, the Guidelines, without more, preclude comprehensive examination of the particular offense and the offender. See *supra* pp. 10-11.

Unwarranted disparity is built into the Guidelines in other ways. For example, regional disparity persists under the Guidelines and has even increased for some offenses. *Fifteen Year Report*, *supra*, at 94, 98, 140. In addition, as the Sentencing Commission acknowledges, "[t]oday's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by

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[23] As observed *supra* p. 13, the goal of reducing unwarranted disparities in sentencing is omitted from the purposes of individualized sentencing set forth in § 3553(a)(2). It is nonetheless not disputed that Congress sought to reduce sentencing disparity overall with passage of the Sentencing Reform Act.

judges in the discretionary system in place immediately prior to guidelines implementation." *Id.* at 135. Rules identified by the Commission that create disparity but are not a "necessary and effective means to achieve the purposes of sentencing" include the drug trafficking guidelines, the relevant conduct rules, the career offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score. *Id.* at 47-55, 76, 113-14, 131-34, 141.[24]

Furthermore, even accepting that the Guidelines, albeit imperfect, are nonetheless the congressionally endorsed federal standards, and therefore the only conceivable "center of gravity" around which uniformity can be maintained, a presumption of reasonableness is not necessary for the Guidelines to serve their purpose of promoting enhanced uniformity. District courts must consider the Guidelines range in their sentencing calculus under § 3553(a)(4). The fact that most courts will use them as a starting point will surely produce an gravitational effect on sentences. But the Guidelines should be accorded no greater force than that which they merit by virtue of being considered as one factor in a multi-factor statutory scheme, in light of both the statute and grave constitutional concerns. *Booker*, 543 U.S. at 260.

Of course, to the extent that the Guidelines were deemed to foster uniformity, such uniformity could be advanced by holding that all sentences outside the Guidelines range are unreasonable. But such a rule would surely run afoul of the Court's holding in *Booker* by effectively eliminating the district courts' sentencing discretion. See 543 U.S. at 311 (Scalia, J., dissenting in part) ("[A]ny system which held it

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[24] *See also* Briton K. Nelson, *Adding Fuel to the Fire:* United States v. Booker *and the Crack Versus Powder Cocaine Sentencing Disparity*, 40 U. Rich. L. Rev. 1161, 1191 (2006); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 117 (2005). *See generally* Erik Luna, *Grid Land: An Allegorical Critique of Criminal Sentencing*, 96 J. Crim. L. & Criminology 25 (2005).

per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."); see also *Moreland*, 437 F.3d at 433-34; *United States* v. *Reinhart*, 442 F.3d 857, 864 (5th Cir.), *cert. denied*, 127 S. Ct. 131 (2006); cf. *Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). As long as district judges have discretion to impose a non-Guidelines sentence when they conclude that the totality of the § 3553(a) factors requires such a sentence, they will (and should) exercise that discretion. If the presumption of reasonableness leads district courts to impose within-Guidelines sentences in cases where they would otherwise impose non-Guidelines sentences, then that is simply evidence that the presumption is operating to cabin unlawfully the district court's exercise of discretion.[25]

2. A Presumption Of Reasonableness Will Stifle Judicial Feedback Needed To Improve The Guidelines.

In passing the Sentencing Reform Act, Congress envisioned a fully "interactive guidelines process" wherein the combined efforts of the Sentencing Commission and federal judges would foster the development of federal sentencing law. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1694 (1992). The Act instructs the Commission to "establish sentencing policies and practices for the Federal criminal justice system that assure ... the

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[25] Moreover, to the extent that courts of appeals rely on the allegedly discretionary nature of the Guidelines to justify diminished procedural protections, yet at the same time cabin the exercise of the district court's discretion through a presumption of reasonableness, fundamental questions of fairness are implicated and the promises of "certainty and fairness in ... sentencing" contained in 28 U.S.C. § 991(b)(1)(B) are undermined. *See also supra* note 11.

meeting of the purposes of sentencing as set forth in [the Act]" and to monitor the sentencing system's effectiveness in meeting the purposes of criminal sentencing set forth in § 3553(a)(2). 28 U.S.C. § 991(b). Crucially, in this "judge-based sentencing system that Congress enacted into law," *Booker*, 543 U.S. at 265, it is judges – not the Commission – who are charged with evaluating the adequacy of the Guidelines in each case to ensure compliance with the purposes of criminal sentencing set forth in § 3553(a)(2). The Senate Report highlighted the need for judges to detail sentencing justifications, so as to "assist[] the Sentencing Commission in its continuous reexamination of its guidelines and policy statements." S. Rep. No. 98-225, at 80.

As noted in *Booker*, the "Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." 543 U.S. at 264 (citing 28 U.S.C. § 994). "The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." *Id.* at 263. Only if the substantive content of reasonableness review is untethered to the Guidelines will the Commission be assured of the thorough assessments by the federal courts needed to "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-65. The Commission can evaluate whether the Guidelines are effective in serving the purposes of sentencing only if district courts are free to sentence outside of the Guidelines when necessary to appropriately individualize sentences, and appellate courts analyze the merits of those judgments in relation to the purposes of sentencing, and not in relation to the Guidelines themselves.

Design flaws in the Guidelines have been recognized by judges since their inception. Such feedback from judges was strongly desired, and was expected to improve the Guidelines. Although there were complaints that the original guidelines were "too harsh," the system was meant to be "evolutionary" and was to be improved based on information from actual practice under the Guidelines. Breyer, *supra*, at 18-20, 23; see also *U.S. Sentencing Guidelines Manual* ch. 1, pt. A., at 1.2 (1991). For example, mitigating factors such as age, employment history, and family ties were not included because the Commissioners could not agree, but this was intended to evolve based on experience. See Breyer, *supra*, at 19-20. From the outset, it was recognized that the Guidelines were based on "false" precision and could be improved in their application through the exercise of "greater judicial discretion" to provide "fairness and equity in the individual case." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 186 (1999) ("*Guidelines Revisited*").

However, under the pre-*Booker* mandatory sentencing regime, federal judges were unable to contribute to the development of federal sentencing law. As recognized in *Booker*, departures under the Guidelines were "not available in every case, and in fact [were] unavailable in most." 543 U.S. at 234. This was not only because the recognized grounds for departures were limited, but because the Commission actively discouraged Guidelines departures. See *Guidelines* § 1A1.1, at 5 ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."); see also *id.* § 5K2.0 cmt. 3(A)(ii), (B)(i) ("[I]t is expected that [most] departures ... will occur rarely and only in exceptional cases."); *id.* § 5K2.0 cmt. background ("[C]ircumstances warranting departure should be rare."). This stance, taken together with the Commission's initial formulation of complex, rigid, and purportedly complete guidelines, and the additional overlay of mandatory minimum sentences legislated by Congress, all limited the extent to

which the federal judiciary could fulfill their expected role of helping to shape federal sentencing law. See generally Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93 (1999).

As a result, the Guidelines have developed largely in response to political concerns driven by Congress and the Executive Branch. See Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 250-56 (2005). Far from evolving based on the daily experiences of judges engaged in sentencing in service of the parsimony provision, the Guidelines have "move[d] only one way: slowly, steadily, pawl by pawl, upward." *Id.* at 256.[26]

After *Booker*, sentencing judges are free to impose sentences outside of the Guidelines system if merited by the § 3553(a) purposes. This does not mean that federal judges may (or should) disregard the Guidelines, but it does mean that sentencing judges may now, when justified by individual circumstances, impose sentences in ways that correct for well-recognized flaws in the Guidelines. Through its data collection and analysis of sentencing decisions, the Commission can then fulfill its mandate to draw upon the collective expertise of Article III judges in the service of revising and improving the Guidelines. Such a meta-dialogue between the courts and the Commission is the congressionally envisioned and optimal means of achieving uniformity: that is, through consensus rather than the unsupported imposition of a legal presumption.

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[26] The number of federal prisoners has more than doubled in the past decade, increasing from 89,538 in 1995 to 179,200 in 2005. On December 31, 2005, 1 in every 136 United States residents was in prison or jail. U.S. Dep't of Justice, Bureau of Justice Statistics, *Bulletin: Prisoners in 2005*, at 1-2 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

But sentencing data will be relevant and useful for revision of the Guidelines only if the touchstone of reasonableness review by the appellate courts is something other than the Guidelines themselves. Put otherwise, if federal judges impose and uphold sentences because they are consistent with the Guidelines – rather than exercise their statutory duty to determine whether a given sentence (including a within-Guidelines sentence) complies with the purposes of sentencing set forth in § 3553(a)(2) – the Commission will be deprived of precisely the sort of information it most needs to refine the Guidelines. Only even-handed "across the board" application of the same quality of judicial attention to the full range of sentences will serve to "continue to move sentencing in Congress' preferred direction." *Booker*, 543 U.S. at 264-65.[27]

III. A WITHIN-GUIDELINES SENTENCE CANNOT BE DEEMED REASONABLE, WHETHER OR NOT A PRESUMPTION OF REASONABLENESS IS ACCORDED, WHEN THE DISTRICT COURT DOES NOT ADEQUATELY EXPLAIN ITS CONSIDERATION OF THE FACTORS AND PURPOSES OF § 3553(a).

That district courts have greater discretion in sentencing post-*Booker* does not negate their statutory duty to articulate their reasoning on the record. To the contrary, this increased discretion heightens both the need for and the value of a reasoned explanation for the sentence imposed, whether it falls within or without the Guidelines range. This Court has made clear, when reviewing language similar to that of § 3553(a), that district courts must articulate their consideration of all

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[27] *See also* The Constitution Project, *Principles for the Design and Reform of Sentencing* 12 (2006), *at* http://www.constitutionproject.org/Sentencing_Principles_Background_Report.pdf ("[E]ffective sentencing guidelines with meaningful appellate review are a critical component of a successful sentencing system.").

factors relevant to judgment. See *United States* v. *Taylor*, 487 U.S. 326, 336 (1988). A sentence imposed without an adequate explanation, whether or not within the range recommended by the Guidelines and whether or not accorded a presumption of reasonableness, cannot be deemed reasonable on appeal.

A. The Sentencing Reform Act Mandates That District Courts Provide A Reasoned Explanation For All Sentences Imposed Based On The Factors And Purposes Of § 3553(a).

The language of the Sentencing Reform Act plainly requires that district courts offer a statement of reasons for all sentences. Section 3553(c) provides, in pertinent part, as follows:

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence ....

§ 3553(c). This provision clearly instructs that the district court must articulate the basis for the sentence imposed in every case. *Id.*; see also *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1114-17 (10th Cir. 2006); *United States* v. *Molina*, 356 F.3d 269, 276-77 (2d Cir. 2004).

The explanation must proceed by reference to the factors and purposes of § 3553(a), as that section mandates that the district court "shall consider" the relevant factors in rendering judgment and "shall impose" the sentence that is "sufficient but not greater than necessary" to comply with the relevant purposes. § 3553(a). The only appropriate sentence is one that adheres to these statutory requirements; therefore, the only appropriate explanation for a sentence is one that relates to these considerations. See *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383; *Jimenez-Beltre*, 440 F.3d at 529-30 (Lipez, J., dissenting). Any sentence that is issued without the support of an on-the-record statement of reasons, justifying the judgment by reference to the factors and purposes of

§ 3553(a), is invalid.[28] See *Johnson*, 467 F.3d at 563, 566; *Cooper*, 437 F.3d at 329-30; *Webb*, 403 F.3d at 383.

This conclusion does not change when the sentence is within the range recommended by the Guidelines, or if a presumption of reasonableness is accorded to it. Institution of a presumption of reasonableness does not alter the plain statutory command of § 3553(c) or lesson the necessity of an explanation of the district court's rationale in imposing sentence. See *Sanchez-Juarez*, 446 F.3d at 1114-17; see also *Johnson*, 467 F.3d at 563, 566; *Foreman*, 436 F.3d at 644; *Webb*, 403 F.3d at 383. A statement of reasons is required for any sentence, regardless of where it falls in the statutory range or whether it is presumed reasonable.[29] See *Sanchez-Juarez*, 446 F.3d at 1114-17.

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[28] The majority of courts have adopted this approach. *See United States* v. *King*, 454 F.3d 187, 196-97 (3d Cir. 2006); *Johnson*, 467 F.3d at 563, 566; *United States* v. *Cunningham*, 429 F.3d 673, 679-80 (7th Cir. 2005); *Feemster*, 435 F.3d at 884; *Diaz-Argueta*, 447 F.3d at 1171; *Sanchez-Juarez*, 446 F.3d at 1114-17. *But see United States* v. *Ayers*, 428 F.3d 312, 315 (D.C. Cir. 2005); *United States* v. *Scherrer*, 444 F.3d 91, 193 (1st Cir. 2006); *Talley* v. *United States*, 431 F.3d 784, 786 (11th Cir. 2006); *Fernandez*, 443 F.3d at 29-30; *Mares*, 402 F.3d at 519.

[29] That the same subsection calls for an even more detailed statement of reasons in two particular situations, *see* § 3553(c)(1), (2), does not negate the general command of § 3553(c) for an explanation of the sentence in all cases. Each of these situations presents a circumstance in which the Guidelines range proves less useful to the district court, either because it is unmanageably broad (i.e., exceeding twenty-four months) or because it has not predicted the final sentence (i.e., a non-Guidelines sentence). *See* § 3553(c)(1), (2). It is perfectly reasonable to require district courts in these cases to provide a more specific statement of reasons than that mandated generally by § 3553(c), in order to provide the Sentencing Commission, Congress, the parties, and the public with the additional information necessary to evaluate the continued viability of the Guidelines as written. *See generally* Breyer, *supra*, at 18-20 (discussing evolutionary process of Guidelines development); Stith & Koh, *supra* (same); S. Rep. No. 98-225 at 80.

In interpreting an analogous statutory scheme that employs the same "shall consider" language, this Court has recognized that district courts must articulate their compliance with a statutory regime setting forth factors to consider in exercising discretionary judgment. The Speedy Trial Act, like the Sentencing Reform Act, provides that district courts "shall consider" a series of enumerated factors in rendering judgment.[30] Implicit in this provision, as this Court held in *United States* v. *Taylor*, 487 U.S. 326 (1988), is a requirement that the district court provide a reasoned and clear explanation of the judgment:

> Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent ....

Id. at 336-37. Courts of appeals can review a lower court's judgment for abuse of discretion only if they are informed whether the district court understood its discretion and how it exercised that discretion.[31] See *id.* When a statute mandates

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[30] *See* 18 U.S.C. § 3162(a)(2) ("In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.").

[31] The reasonableness review of sentencing decisions established by *Booker* is "akin" to a review for abuse of discretion, in that the appellate court is not to conduct *de novo* review, and should accord deference to the district court's factual determinations and assessment of the purposes of sentencing to be furthered in each case. But, of course, even under an abuse of discretion standard, the appellate court must determine whether the district court properly applied the law. *See Martin* v. *Franklin Capital*

consideration of several factors as a prerequisite to judgment, as does the Sentencing Reform Act, district courts are obliged to offer an on-the-record statement of the reasons supporting their decisions.[32] See *id.* at 326-27; see also Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 770 (1982) (citing K. Davis, *Discretionary Justice: A Preliminary Inquiry* 103-06 (1969)).

Reasons are not the same as conclusions. Even though some courts have held it sufficient for the district court to simply recite that it considered the § 3553(a) factors, see, *e.g.*, *Fernandez*, 443 F.3d at 29-30; *Talley*, 431 F.3d at 786; *Ayers*, 428 F.3d at 315; *Mares*, 402 F.3d at 519, such a rote recitation offers no information about how the district court decided upon the sentence ultimately imposed, and affords no opportunity for the reviewing court to determine whether the

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Corp., 126 S. Ct. 704, 710 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.") (second alteration in original) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)). Here, § 3553(a) sets forth governing legal standards, and the reviewing court has a duty to confirm that these standards were correctly applied – i.e., to assess whether the district court has considered the sentencing factors specified in § 3553(a) without placing undue weight on the Guidelines, as dictated by the plain language of the statute. *See United States* v. *Schweitzer*, 454 F.3d 197, 204 (3d Cir.), *cert. denied*, 127 S. Ct. 600 (2006).

[32] *See also Schweitzer*, 454 F.3d at 205-06 ("There is simply no substitute for on-the-record discussion and deliberation. It ensures that the parties are fully informed of their rights and obligations and that the appellate court will be able to assess the merits of the final judgment."); *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (stating that a court cannot "infer a reasoned exercise of discretion from a record that . . . is silent"); *Extra Equipamentos E. Exotica Ltd.* v. *Case Corp.*, 361 F.3d 359, 361-62 (7th Cir. 2004) ("[B]efore the issue of abuse is even reached, the appellate court must be satisfied that the judge has exercised her discretion responsibly by considering all the salient factors that would enter into a responsible exercise."); *cf.* Steven Childress & Martha Davis, *Federal Standards of Review* § 7.06[B][3] (2004) ("The appellate court is not reviewing the decision but, instead, the manner of making it.").

statutory factors were properly weighted. In this respect, the court of appeals is in no better position than a university professor asked to grade a student paper that contains only a conclusion and a bibliography. Absent an explanation of the reasons for imposing a sentence, the appellate court cannot review the decision-making process underlying the district court's imposition of a sentence. It is only the statement of reasons that makes appellate review for "reasonableness" possible. See *Diaz-Argueta*, 447 F.3d at 1171; *King*, 454 F.3d at 196-97; *Feemster*, 435 F.3d at 884; *Cunningham*, 429 F.3d at 679-80.

The indispensable role of the statement of reasons given in open court by the sentencing judge is further confirmed by the legislative history of § 3553. Prior to 1984, district courts' discretion in sentencing was not circumscribed by statute and was virtually limitless. See generally Stith & Koh, *supra*. There was no need for an explanation of the sentence since, in the absence of governing standards, the court of appeals had no basis to overturn any judgment within the broad statutory maxima and minima.

This changed with the Sentencing Reform Act. The Act imposed clear and measurable standards by which courts of appeals could review the district courts' exercise of discretion. See § 3553(a). Articulation of the district court's judgment thus became important, to facilitate appellate review and ensure compliance with the statute. See, *e.g.*, *Johnson*, 467 F.3d at 563, 566; *Cooper*, 437 F.3d at 329-30. It was for this purpose that Congress included a provision in the Act requiring district courts to offer statements of reasons for all sentences. See, *e.g.*, S. Rep. No. 98-225, at 52. Mere lip service might have been sufficient to justify a Guidelines sentence in a mandatory regime where district courts' discretion to sentence outside of the Guidelines range was extremely limited; post-*Booker*, the district court must provide a reasoned explanation of how the statutory factors were considered in order to demonstrate that it properly exercised its discretion. The validity of a sentence, whether or not it falls within the Guide-

lines range and whether or not a presumption of reasonableness is accorded, depends on the adequacy of this explanation.

B. The District Court In This Case Failed To Provide An Adequate Explanation For The Sentence.

The brief comments offered by the district court in this case fall far short of satisfying the statutory requirement of an adequate statement of reasons. The district court merely noted, prior to imposing sentence: "The Court is unable to find that the sentencing guideline range ... is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true." J.A. 87. It did not resolve open evidentiary issues in the record, including the nature of Mr. Rita's medical conditions or his military and civil service. It did not address the relationship of those facts and others to the factors and purposes of § 3553(a). It did not assess how the final sentence to be imposed would advance the traditional goals of sentencing or whether that sentence was the least restrictive means available to further those purposes.

More was necessary. There can be no effective appellate review of a sentence when the district court fails to explain its decision by reference to the factors and purposes of § 3553(a). See *Taylor*, 487 U.S. at 326-27. The only conclusion an appellate court can draw from a judgment not supported by an adequate statement of reasons is that the district court failed to consider all relevant factors and failed to craft a penalty that was "sufficient but not greater than necessary" to satisfy the goals of § 3553(a)(2). See *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383. The sentence in this case was not supported by a satisfactory statement of reasons and must therefore be deemed unreasonable.

Nor can Mr. Rita's sentence be upheld on the mere basis of a presumption of reasonableness for a within-Guidelines sentence. The court of appeals disregarded record evidence that

the presumption was rebutted in this case. And, there is no basis in either the Sentencing Reform Act or in *Booker* for the sentence to have been upheld based upon the rote application of such a presumption.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fourth Circuit, vacate the sentence, and remand to the district court for resentencing.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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[1] So in original. The period probably should be a semicolon.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

> (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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[3] So in original. The second comma probably should not appear.

18 U.S.C. § 3162. Sanctions

* * * *

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

* * * *

18 U.S.C. § 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation

with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining suffici-ent flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not

taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense

involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and govern-ing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

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[1] So in original. Probably should be "incidence".

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of proba-tion, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

---

[1] So in original. Probably should be "incidence".

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and

Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an of-

fense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission

a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the

grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a

format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

ORIGINAL

(14)

No. 06-5754

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR A. RITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that, on review pursuant to United States v. Booker, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. A number of petitions for a writ of certiorari have recently been filed challenging the application of a presumption that sentences within a properly calculated advisory Guidelines range are reasonable on appellate review. As the government has explained in briefs in opposition to those petitions, according a Guidelines sentence a presumption of reasonableness is consistent with Booker and with the Sentencing Reform Act of 1984, 18 U.S.C. 3551 et seq., and does not make the

Guidelines effectively mandatory; it is not clear that reasonableness review is materially different in circuits that have adopted the presumption than in those that have not; and petitions raising presumption-of-reasonableness challenges need not be held pending the disposition of Cunningham v. California, No. 05-6551, cert. granted (Feb. 21, 2006). See, e.g., Gov't Br. in Opp. at 7-15, Guzman-Balbuena v. United States, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006); Gov't Br. in Opp. at 13-21, Artis v. United States, No. 05-10431, 2006 WL 1733084 (filed June 19, 2006). Accordingly, for the reasons set out in the briefs in opposition to those petitions, the petition for a writ of certiorari should be denied.*

'AUL D. CLEMENT
Solicitor General

AUGUST 2006

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* The government waives any further response to the petition unless this Court requests otherwise.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. 3553(a) factors and any other factors that might justify a lesser sentence?

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In the Supreme Court of the United States

No. 06-5754

VICTOR A. RITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 112-113) is not published in the Federal Reporter but is reprinted in 177 Fed. Appx. 357.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2006. The petition for a writ of certiorari was filed on July 28, 2006, and was granted on November 3, 2006, limited to the questions specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-30a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623, two counts of making false statements, in violation of 18 U.S.C. 1001, and one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed.

1. In 2003, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigated whether InterOrdnance of America (InterOrdnance), a licensed firearms dealer in Monroe, North Carolina, had illegally imported machine-gun parts kits. The ATF determined that federal law classified certain items sold by InterOrdnance, including a parts kit that could be used to assemble a PPSH-41 submachine gun, as machine guns that could not be possessed legally without registration. In April 2003, ATF agents began a nationwide recall of the PPSH-41 parts kits, contacting customers who had purchased the kits from InterOrdnance and asking the customers to turn the kits over to the ATF. One of the customers reported that he had discussed the recall with an InterOrdnance employee, who had advised him not to turn the kit over to the ATF. J.A. 16-19, 21-22; Sealed J.A. 119; Supp. J.A. 1-2, 11, 13; see 26 U.S.C. 5841, 5845(a)(6) and (b), 5861.

Petitioner had purchased a PPSH-41 parts kit from InterOrdnance in January 2003. At the time, petitioner was an asylum officer with the Department of Homeland Security (DHS). ATF Agent Bonnie Levin subsequently contacted petitioner and informed him of the recall. During a telephone conversation on September 4, 2003, petitioner agreed that he

would turn the kit over to the agent the following week. Sealed J.A. 119-120, 128-129; Supp. J.A. 5-8.

After speaking with Agent Levin, petitioner placed a call to InterOrdnance. Two days later, he mailed the PPSH-41 parts kit to the company. Petitioner did not attend the scheduled meeting with Agent Levin. Through his attorney, petitioner subsequently turned over to the ATF a different parts kit that he had purchased from InterOrdnance, one that was not the subject of a recall. J.A. 23-24; Sealed J.A. 120; Supp. J.A. 2-5, 8-10, 13-14.

On October 27, 2003, petitioner testified before a federal grand jury in the Western District of North Carolina that was investigating InterOrdnance's sales of the PPSH-41 parts kits. Petitioner denied having had any telephone conversation with InterOrdnance before he returned the kit to the company. Petitioner also claimed that Agent Levin had not asked him to turn over the PPSH-41 parts kit to the ATF. J.A. 19; Sealed J.A. 120-121; Supp. J.A. 11-12.

2. Based on the two false statements before the grand jury, petitioner was charged in an indictment with two counts of perjury, two counts of making false statements, and one count of obstruction of justice. A jury found him guilty of all five charges. J.A. 7-13, 94, 103; Sealed J.A. 118.

3. After the verdict but before sentencing, see J.A. 2, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. *Id.* at 226-244. As a remedy for that constitutional violation (*id.* at 244-268), the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effec-

tively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory nature of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). The purposes set forth in paragraph (2) are that the sentence imposed

> (A) "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense";
>
> (B) "afford adequate deterrence to criminal conduct";
>
> (C) "protect the public from further crimes of the defendant"; and
>
> (D) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. 3553(a)(2). Section 3553(a) also provides that, "in determining the particular sentence to be imposed," courts "shall consider" seven factors:

> (1) "the nature and circumstances of the offense and the history and characteristics of the defendant";

(2) "the need for the sentence imposed" to satisfy the purposes set forth in paragraph (2);

(3) "the kinds of sentences available";

(4) "the kinds of sentence and the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines * * * issued by the Sentencing Commission";

(5) "any pertinent policy statement * * * issued by the Sentencing Commission";

(6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and

(7) "the need to provide restitution to any victims of the offense."

18 U.S.C. 3553(a) (2000 & Supp. IV 2004).

4. a. Because petitioner's crimes involved obstructing the investigation of a criminal offense and perjury in respect to a criminal offense, the Presentence Investigation Report (PSR) calculated petitioner's Sentencing Guidelines offense level using the cross-references in the guidelines for obstruction of justice and perjury, Sections 2J1.2(c) and 2J1.3(c). The cross-references required application of the guideline for accessories after the fact, Section 2X3.1(a)(1), which provides for a base offense level six levels lower than the offense level for the underlying offense. The underlying offense in this case was InterOrdnance's importation of defense articles without authorization, in violation of 22 U.S.C. 2778(b)(2). Under the guideline applicable to that offense, Section 2M5.2(a)(1), the base offense level is 26. The PSR therefore determined that

petitioner's base offense level was 20. Because there were no applicable upward or downward adjustments, petitioner's total offense level was also determined to be 20. Sealed J.A. 122-125.

In calculating petitioner's criminal history, the PSR noted that he had been convicted in 1986 of making false statements in connection with the purchase of firearms, in violation of 18 U.S.C. 922(a)(6), and had received a probationary sentence. The conduct that resulted in that conviction involved petitioner's providing false addresses on 19 ATF-4473 forms when he purchased 27 firearms of various types. At the time, petitioner was a criminal investigator with the Immigration and Naturalization Service (INS); the INS suspended him because of the conviction. The PSR determined that the 1986 conviction resulted in no criminal history points, apparently because, under Section 4A1.2(e) of the Guidelines, the conviction was too old. Since petitioner had no other prior convictions, the PSR determined that he was in criminal history category I. Sealed J.A. 125, 129.

The combination of offense level 20 and criminal history category I yielded an advisory Guidelines range of 33 to 41 months of imprisonment. Sealed J.A. 132.

Petitioner did not challenge the PSR's calculation of the Guidelines range. He did move for a downward departure, however, on three asserted grounds: (1) his prior military service (petitioner had been a member of the Marine Corps, Army, and Army Reserve, had served in the Vietnam War and Operation Desert Storm, and had received a number of medals and awards); (2) his medical condition (petitioner had several health problems, including diabetes, an enlarged prostate, a herniated disk, excess lipids in his blood, arthritis, sleep apnea, and skin rashes and infections he claimed were the result of exposure to Agent Orange); and (3) the possibility that his prior involvement in criminal cases as an employee

of the INS and DHS would make him susceptible to abuse in prison. J.A. 40-47, 49-73; Sealed J.A. 127-129.

b. At sentencing, the district court held a lengthy colloquy with petitioner's counsel about his arguments for a below-Guidelines sentence and the evidence he submitted. J.A. 51-73. The court also confirmed that petitioner sought "a departure from the guidelines or a sentence under [18 U.S.C.] 3553 that is lower than the guidelines" based on the three grounds described above. J.A. 64-65. The court suggested, however, that petitioner's military service would not entitle him to "special treatment" unless it was "extraordinary," J.A. 65; noted that "the federal prison system is equipped to handle people with diabetes and many other difficult situations," J.A. 71; and questioned the assistance petitioner had provided in criminal investigations, J.A. 57-58.

The prosecutor urged the district court to impose a sentence within the Guidelines range. J.A. 74-77. He argued that a Guidelines sentence was warranted because petitioner had obstructed an important investigation into the unlawful importation of machine guns, J.A. 74-75; because petitioner had previously been convicted of "lying on firearm permit applications," J.A. 76; because petitioner's "history as a law enforcement officer" makes him particularly undeserving of a lenient sentence, J.A. 77; and because petitioner's conviction in this case might compromise criminal cases in which petitioner had been involved when he worked for the government, J.A. 76-77.

Petitioner gave a lengthy allocution. J.A. 78-86. He stated, repeatedly, that he had not provided false testimony to the grand jury, J.A. 80, 83, 85; that he was "innocent" of the crimes of which the jury had found him guilty, J.A. 81, 83, 84; and that Agent Levin had perjured herself at his trial, J.A. 79, 85. Petitioner also claimed that the prosecutor had "purposely misled" the grand jury and trial jury, J.A. 85, and that

petitioner was the "victim" of "a modern day version of the Inquisition," J.A. 80.

c. In announcing its sentence, the district court stated that it had "reviewed the sentencing guidelines with respect to the charges here," which it found to be "serious matters." J.A. 86. The court then stated that it was "unable to find that the sentencing guideline range * * * is an inappropriate guideline range" for the charges. J.A. 87. The court also stated that, "under [18 U.S.C.] 3553, certainly the public needs to be protected if [the charges are] true, and I must accept as true the jury verdict that [petitioner] violated the laws that he is accused of violating, all five of them." *Ibid.* The court imposed a sentence of 33 months of imprisonment, the bottom of the advisory Guidelines range. J.A. 87, 103-111.

5. Petitioner appealed. The "sole issue on appeal" was "whether the sentence imposed by the district court was reasonable." J.A. 112. The court of appeals held that it was and therefore affirmed. J.A. 112-113.

The court of appeals explained that, after *Booker*, district courts are "no longer bound by the range prescribed by the sentencing guidelines" but are "still required to calculate and consider the guideline range," together with "the [other] factors set forth in 18 U.S.C. § 3553(a)." J.A. 112-113. Quoting one of its prior decisions, the court then stated that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." J.A. 113 (quoting *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006)) (internal quotation marks omitted). The court concluded that the district court in this case had "properly calculated the guideline range," "appropriately treated the guidelines as advisory," and "sentenced [petitioner] only after considering the factors set forth in § 3553(a)." *Ibid.* On the basis of "these factors," and because the district court had "sentenced [petitioner] within the applicable guideline range

and the statutory maximum," the court of appeals found that "[the] sentence of thirty-three months' imprisonment is reasonable." *Ibid.*

SUMMARY OF ARGUMENT

I. A sentence within a properly calculated Guidelines range is entitled to a presumption of reasonableness on appeal. That conclusion is fully consistent with *United States* v. *Booker*, 543 U.S. 220 (2005). In concluding that district court consideration of advisory Guidelines, with appellate review for unreasonableness, would promote uniformity in sentencing (the principal objective of the SRA), *Booker*'s remedial holding emphasized the critical role that the Guidelines would continue to play in moving sentencing in the direction of greater uniformity. See 543 U.S. at 263-264. According a presumption of reasonableness to a sentence within the advisory Guidelines range also reflects a recognition that a within-Guidelines sentence will ordinarily represent a reasonable application of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That is so for several reasons. The Guidelines are written and revised by an expert agency, with an intent to integrate the Section 3553(a) factors and with input from Congress and sentencing judges across the country. Moreover, a presumption of reasonableness for Guidelines sentences is the only practicable way to avoid unwarranted sentencing disparities, which is itself an enumerated concern under Section 3553(a). In addition, the imposition of a Guidelines sentence means that two actors occupying different positions in the system—the sentencing judge and the Sentencing Commission—have jointly determined that a Guidelines sentence is appropriate in that case. Presuming that a sentence within the Guidelines range is reasonable does not make the Guidelines effectively mandatory, in violation of *Booker*'s Sixth Amendment holding. The presumption does not mean that a

sentence *outside* the Guidelines range is presumptively *un*reasonable, let alone mandate additional factfinding by the judge to justify a non-Guidelines sentence.

II. The SRA requires a judge to state the reasons for the sentence imposed. 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). When a district court imposes a sentence within the Guidelines range, and satisfies the requirement of Section 3553(c) by providing the general reasons for the sentence imposed, the court is not required to analyze explicitly the Section 3553(a) factors or all of the possible justifications for a lesser sentence. Because the imposition of a within-Guidelines sentence reflects agreement with the Sentencing Commission's assessment of the Section 3553(a) factors as applied to the case before the court, Section 3553(c) requires "little explanation" for a within-Guidelines sentence. *E.g.*, *United States* v. *Sam*, 467 F.3d 857, 864 (5th Cir. 2006). Courts are not required to furnish "specific verbal formulations" to demonstrate that the district court considered the Section 3553(a) factors. *United States* v. *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Nor is a court required to address every argument raised by a party for a sentence above or below the Guidelines range. Sentencing records generally confirm the presumption that the court has exercised its discretion after considering the arguments of the parties and the court's statutory duties. Rather than vacate such a sentence for a fuller explanation, a court should proceed to review its substantive reasonableness.

III. Petitioner's sentence, which was at the bottom of the advisory Guidelines range, was reasonable. Because the district court considered the factors in Section 3553(a) and provided a statement of reasons as required by Section 3553(c), the within-Guidelines sentence is entitled to a presumption of reasonableness. Petitioner cannot rebut that presumption. Petitioner relies on personal mitigating factors, but the judge

was entitled to weigh the significant aggravating factors as well. As the district court found, petitioner's crimes were "serious," J.A. 86; petitioner committed a similar crime in the past, and committed both the past and the present crimes while employed as a federal immigration official; and he expressed no remorse at sentencing. Under these circumstances, petitioner cannot show that a sentence at the bottom of the Guidelines range is outside the range of reasonableness.

ARGUMENT

I. A SENTENCE WITHIN A PROPERLY CALCULATED GUIDELINES RANGE IS ENTITLED TO A REBUTTABLE PRESUMPTION OF REASONABLENESS ON APPEAL

Since this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), seven courts of appeals have held that a sentence within a properly calculated Guidelines range is presumptively reasonable on appellate review.[1] That presumption means that a within-Guidelines sentence is accorded substantial deference by the court of appeals. See, *e.g.*, *United States* v. *Rivera*, 463 F.3d 598, 602 (7th Cir. 2006); *United States* v. *Candia*, 454 F.3d 468, 473 (5th Cir. 2006). But it does not mean that such a sentence is reasonable *per se* (*i.e.*, the presumption is not a conclusive one). See, *e.g.*, *United States* v. *Boscarino*, 437 F.3d 634, 637 (7th Cir. 2006), petition for cert. pending, No. 05-1379 (filed Apr. 27, 2006); *United*

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[1] See *United States* v. *Dorcely*, 454 F.3d 366, 376 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006), petition for cert. pending, No. 06-5275 (filed July 11, 2006); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716, 717 (8th Cir.), cert. denied, 126 S. Ct. 840 (2005); *United States* v. *Kristl*, 437 F.3d 1050, 1053-1054 (10th Cir. 2006).

States v. *Richardson*, 437 F.3d 550, 554 n.2 (6th Cir. 2006). Even a within-Guidelines sentence must be vacated if the party challenging it can show that, under the facts and circumstances of the case, the sentence imposed was unreasonable in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004).[2]

Application of a presumption of reasonableness accords with *Booker* and with sound principles of appellate review.

A. *Booker* Makes Clear That The Guidelines Will Continue To Play A Critical Role In Sentencing

1. *Booker* held that the Sixth Amendment is violated when a defendant's sentence is increased based on judicial factfinding under mandatory Guidelines. 543 U.S. at 226-244. As a remedy for that violation, the Court excised 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which made the Guidelines mandatory, and 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), an appellate-review provision that reinforced the Guidelines' mandatory nature. 543 U.S. at 244-268. As a consequence of *Booker*'s remedial holding, the Guidelines are now advisory and federal sentences are reviewable for unreasonableness. *Booker*'s remedial holding rested on the conclusion that "Congress would likely have preferred the excision of * * * the

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[2] Although four circuits have declined to adopt a presumption of reasonableness for within-Guidelines sentences, those courts agree that a sentence within a properly calculated advisory Guidelines range will seldom be unreasonable. See *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (Guidelines "continue * * * to be an important consideration * * * on appeal"), cert. denied, No. 06-5727 (Jan. 8, 2007); *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir.) (Guidelines sentence will be reasonable "in the overwhelming majority of cases"), cert. denied, 127 S. Ct. 192 (2006); *United States* v. *Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) ("a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range"); *United States* v. *Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (Guidelines sentence is "ordinarily" reasonable).

[SRA's] mandatory language[]" to any other remedy, *id.* at 249, largely because that excision is most consistent with "Congress' basic goal in passing the [SRA]," which was "to move the sentencing system in the direction of increased uniformity," *id.* at 253; accord *id.* at 250, 252, 255-256.

In concluding that an advisory Guidelines regime with appellate review for unreasonableness was most likely to foster uniformity in sentencing, the Court emphasized that the Guidelines, although advisory, would continue to play an important role. For example, responding to the argument that the reasonableness standard would lead to "excessive sentencing disparities," *Booker*, 543 U.S. at 263 (quoting *id.* at 311 (Scalia, J., dissenting in part)), the Court observed that the Sentencing Commission would "continue to collect and study appellate court decisionmaking," would "continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices," and would "thereby promote uniformity in the sentencing process." *Ibid.* Then, in explaining why "the [SRA] without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent," *id.* at 264, the Court said the following:

> [T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing

> disparities while maintaining flexibility sufficient to individualize sentences where necessary.

Id. at 264-265 (citations omitted).

A presumption that a sentence within the advisory Guidelines range is reasonable is obviously consistent with *Booker*'s emphasis on the Guidelines' continuing importance. Indeed, given the Court's recognition of the Guidelines' critical role in avoiding unwarranted sentencing disparities and its statement that appellate review would "tend to iron out sentencing differences," 543 U.S. at 263, it is entirely in keeping with *Booker* to presume that a sentence within the advisory Guidelines range is reasonable on appellate review.

2. The Court stated in *Booker* that the reasonableness standard of review applies "across the board." 543 U.S. at 263. Petitioner and a number of his amici contend that it violates that principle, and therefore conflicts with *Booker*, to apply a presumption of reasonableness to sentences within the Guidelines range but not to sentences outside it. Pet. Br. 6-7, 24-25; Families Against Mandatory Minimums (FAMM) Br. 23-24; Fed. Publ. & Cmty. Defenders (FPCD) Br. 15. That is not correct. When the Court said that the standard applies "across the board," *Booker*, 543 U.S. at 263, it meant only that *all* sentences are to be reviewed for reasonableness —not merely, as was the case when the Guidelines were mandatory, sentences resulting from Guidelines "departures" and sentences in cases "where there was no applicable Guideline," *id.* at 262 (citing 18 U.S.C. 3742(e)(3) and 18 U.S.C. 3742(a)(4), (b)(4), and (e)(4)). That remains true whether or not appellate courts apply a presumption of reasonableness to within-Guidelines sentences. For all sentences, the standard of review is the same: whether the sentence is reasonable in light of the factors in Section 3553(a). See *Booker*, 543 U.S. at 260-265. The presumption merely recognizes that, when the Sentencing Commission and the individual district court reach

essentially the same conclusion, the resulting within-Guidelines sentence ordinarily satisfies that standard.

The Court also stated in *Booker* that it was "fair * * * to assume judicial familiarity with a 'reasonableness' standard," because the SRA had long required the application of such a standard in reviewing departures and sentences with no guideline. 543 U.S. at 262-263. In support of that proposition, the Court cited (*id.* at 262) six court of appeals decisions that had applied a "reasonableness" standard in reviewing sentences imposed for a violation of probation or supervised release—sentences for which the Guidelines recommended non-binding sentencing ranges in a policy statement, see Sentencing Guidelines § 7B1.4. Petitioner suggests that a presumption of reasonableness is inconsistent with *Booker* because the decisions cited by the Court "d[id] not afford * * * a presumption of reasonableness to sentences imposed within the recommended [Guidelines] range." Pet. Br. 26. But those decisions had no occasion to consider whether a within-Guidelines sentence should be presumed reasonable, because all the sentences imposed in those cases were *outside* the Guidelines range.[3] *Booker*'s citation of those cases therefore lends no

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[3] See *United States* v. *White Face*, 383 F.3d 733 (8th Cir. 2004) (for one defendant, Guidelines range was 3 to 9 months and sentence was 12 months; for two defendants, Guidelines range was 3 to 9 months and sentence was 24 months; for one defendant, Guidelines range was 5 to 11 months and sentence was 48 months; for one defendant, Guidelines range was 8 to 14 months and sentence was 18 months); *United States* v. *Tsosie*, 376 F.3d 1210 (10th Cir. 2004) (Guidelines range was 3 to 9 months and sentence was 18 months), cert. denied, 543 U.S. 1155 (2005); *United States* v. *Salinas*, 365 F.3d 582 (7th Cir. 2004) (Guidelines range was 3 to 9 months and sentence was 24 months); *United States* v. *Cook*, 291 F.3d 1297 (11th Cir. 2002) (per curiam) (Guidelines range was 5 to 11 months and sentence was 24 months); *United States* v. *Olabanji*, 268 F.3d 636 (9th Cir. 2001) (Guidelines range was 3 to 9 months and

support to the notion that the Court implicitly rejected a presumption of reasonableness for within-Guidelines sentences.

B. A Presumption Of Reasonableness For Guidelines Sentences Recognizes That A Sentence Within The Guidelines Range Will Ordinarily Reflect A Reasonable Application Of The Factors In 18 U.S.C. 3553(a)

According a presumption of reasonableness to within-Guidelines sentences is also consistent with *Booker* because it reflects a recognition that a sentence within the Guidelines range will, in all but the most unusual cases, be within the range of sentences that a district court, in the exercise of its discretion, could reasonably determine best satisfies the considerations in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). As explained below, that is true for four related reasons: the Guidelines integrate the factors in Section 3553(a); they reflect the Sentencing Commission's extensive consideration of past practice and sound policy, including Congress's directions regarding appropriate sentences for certain crimes; they are a critical tool for achieving Congress's goal of sentencing uniformity; and, finally, a Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing Commission that a sentence within the Guidelines range complies with the factors in Section 3553(a).

1. The Guidelines integrate the congressional sentencing objectives in 18 U.S.C. 3553(a)

Booker holds that "reasonableness" review requires appellate courts to determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. It is appropriate to accord a presumption of reasonableness

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sentence was 12 months and one day); *United States* v. *Ramirez-Rivera*, 241 F.3d 37 (1st Cir. 2001) (Guidelines range was 3 to 9 months and sentence was 24 months).

to a sentence within the advisory Guidelines range because, rather than being "something separate and apart from Congress's objectives in § 3553(a)," the Guidelines "embody many of those objectives." *United States* v. *Johnson*, 445 F.3d 339, 343 (4th Cir. 2006) (Wilkinson, J.). Indeed, the Guidelines "are the only *integration* of the *multiple* factors" in Section 3553(a). *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (Boudin, C.J.), cert. denied, No. 06-5727 (Jan. 8, 2007).

a. In the SRA, Congress provided detailed guidance to the Sentencing Commission about how to formulate the Guidelines. See *Mistretta* v. *United States*, 488 U.S. 361, 374-377 (1989). Congress's charge to the Commission is "a virtual mirror image" of the factors sentencing courts are directed to consider in Section 3553(a). *United States* v. *Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005).

Congress specifically directed the Commission to formulate Guidelines that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. 991(b)(1)(A); see 28 U.S.C. 994(f) and (m). Congress also required that, in formulating the Guidelines, the Commission consider the appropriate role and weight, in light of Congress's policy choices, of various factors relating to the nature and circumstances of the offense and the history and characteristics of the defendant. See *Mistretta*, 488 U.S. at 375-376; compare 28 U.S.C. 994(c)-(d) (directing Commission to consider "the circumstances under which the offense was committed" and to determine whether various characteristics of the offender "have any relevance to * * * an appropriate sentence") with 18 U.S.C. 3553(a)(1) (requiring sentencing courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"). And Congress's command in 28 U.S.C. 991(b)(1)(B) that the Commission establish sentencing practices and policies that "avoid[]

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" is virtually identical to the requirement of 18 U.S.C. 3553(a)(6) that sentencing courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Congress has also played a direct role in formulating the Guidelines. Guidelines issued by the Commission must be submitted to Congress and do not take effect for a period of 180 days, during which time Congress may "modif[y] or disapprove[]" the proposed guidelines. 28 U.S.C. 994(p). Even after Guidelines have taken effect, Congress can "revoke or amend" them "at any time." *Mistretta*, 488 U.S. at 393-394. Congress has in fact exercised that authority, and rejected proposed guidelines. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334 (28 U.S.C. 994 note). Congress has also directed the Commission to review and, if appropriate, amend Guidelines, see 28 U.S.C. 994 note (Provisions for Review, Promulgation, or Amendment of Federal Sentencing Guidelines), and has enacted Guidelines amendments itself, see PROTECT Act, Pub. L. No. 108-21, § 401(b), (g) and (i), 117 Stat. 668, 671 and 672.

Congress's role in actively influencing the Guidelines strongly suggests that they are consistent with the sentencing factors that Congress included in Section 3553(a). "It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, * * * the resulting Guidelines did not well serve the underlying congressional purposes [behind sentencing]." *United States* v. *Cage*, 451 F.3d 585, 593 (10th Cir.

2006) (quoting *United States* v. *Wilson*, 350 F. Supp. 2d 910, 915 (D. Utah 2005)).

b. Petitioner and several of his amici claim that, regardless of whether the Commission was *directed* to incorporate the Section 3553(a) factors in formulating the Guidelines, it did not in fact do so. That claim lacks merit.

To begin with, the Commission has not "disavow[ed] any adherence to the enumerated purposes of punishment" or "acknowledg[ed] that [it] was unable to reconcile [the] purposes of sentencing or apply them directly in crafting the Guidelines," as petitioner contends. Br. 13; accord Nat'l Ass'n of Criminal Def. Lawyers (NACDL) Br. 14-15; N.Y. Council of Def. Lawyers Br. (NYCDL) Br. 16. Consistent with Congress's directive, the Commission sought to "balance all the objectives of sentencing" described in 18 U.S.C. 3553(a)(2) in formulating the Guidelines. United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16 (1987) (*Supplementary Report on the Guidelines*). The Commission began by analyzing current sentencing practices. *Id.* at 16-17; see 28 U.S.C. 994(m) (requiring Commission, "as a starting point," to "ascertain the average sentences imposed" in "particular categories of cases"). It recognized that its empirical approach would "help[] [to] resolve its philosophical dilemma" concerning the purposes of sentencing by "looking to those distinctions judges and legislators have in fact made over the course of time." *Supplementary Report on the Guidelines* 17. Those "established distinctions," the Commission explained, were ones that the community had concluded were important in achieving the purposes of criminal punishment. *Ibid.* The Commission's "pragmatic approach," therefore, did not "imply that philosophical issues were ignored." *Ibid.* Rather, the Commission attempted to formulate Guidelines that were

"consistent with the differing philosophies" of sentencing represented in Section 3553(a). *Ibid.*[4]

Petitioner and his amici are also mistaken in their contention that the Commission could not have taken the Section 3553(a) factors into account in formulating the Guidelines because, whereas Section 3553(a)(1) requires sentencing courts to consider "the history and characteristics of the defendant," the Guidelines, see, *e.g.*, Sentencing Guidelines §§ 5H1.1 to 5H1.6, 5H1.11 to 5H1.12, prohibit or discourage departures based on certain characteristics of the defendant. Pet. Br. 13-14, 27; FAMM Br. 20; NACDL Br. 15-16; Nat'l Veterans Legal Servs. Program (NVLSP) Br. 4-13; NYCDL Br. 17-18. Consideration of the history and characteristics of the defendant entails a determination of what, if any, weight should be given to a particular circumstance; it does not require that positive weight be given to every circumstance. The Guidelines reflect the Commission's considered judgment that the purposes of sentencing in Section 3553(a)(2) are best achieved by giving little or no weight to offender characteristics such as education and vocational skills, employment record, family ties and responsibilities, and community ties. See Sentencing Guidelines §§ 5H1.2, 5H1.5, 5H1.6. Congress itself was of the view that it is "general[ly] inappropriate[]" to consider those characteristics, 28 U.S.C. 994(e), because of

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[4] A good example of the Commission's accommodation of the variety of purposes of sentencing is its adoption of the criminal history axis for the Sentencing Table. The Commission recognized that the SRA "sets forth four purposes of sentencing," and designed its criminal history categories to reflect all of them. Sentencing Guidelines Ch. 4, Pt. A, intro. comment. Thus, rather than focus on a defendant's potential for recidivism alone, "[t]he Sentencing Commission currently uses the criminal history measure as a tool to measure offender culpability, to deter criminal conduct, and to protect the public from further crimes of the defendant." United States Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 1 (2004).

the possible "inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," S. Rep. No. 98-225, at 175 (1983). And Congress directed the Commission to ensure that the Guidelines reflect that legislative judgment. 28 U.S.C. 994(e).

Petitioner's amici also err in contending that amendments to the Guidelines "ha[ve] not been accompanied by empirical data that tie the [amendments] to the purposes of sentencing." NACDL Br. 23; accord Miller Br. 16-18. As the Sentencing Commission explains in its *amicus* brief, the use of sentencing data is reflected in the explanations accompanying many of the amendments to the Guidelines. United States Sentencing Comm'n (USSC) Br. 11 n.8 (citing examples).

Finally, in light of Congress's role in superintending the Guidelines, see p. 18, *supra*, it seems difficult to maintain that the Commission has systematically disregarded Congress's direction to consider the Section 3553(a) factors. To the contrary, experience suggests that Congress knows how to intervene when it finds a proposed guideline wanting and that Congress does not intervene frequently. Together those factors belie the suggestion that the Guidelines generally ignore Congress's mandate.

c. Treating a within-Guidelines sentence as presumptively reasonable because the Guidelines incorporate the Section 3553(a) factors does not mean, as petitioner suggests, that the Guidelines are a "substitute" for the other Section 3553(a) factors. Br. 10. As *Booker* makes clear, see 543 U.S. at 259-261, sentencing courts are required to consider *all* the factors in Section 3553(a), including, in light of the Guidelines' now-advisory status, many factors "that were specifically prohibited by the guidelines," *United States* v. *Long*, 425 F.3d 482, 488 (7th Cir. 2005). Likewise, on appellate review, if the appellant can demonstrate that the Section 3553(a) factors as

applied to the facts of the case are such that a within-Guidelines sentence is unreasonable, the sentence will be vacated.

Petitioner is also mistaken in contending that, because the Guidelines themselves are one of the factors that must be considered, 18 U.S.C. 3553(a)(4)-(5) (2000 & Supp. IV 2004), it would render the other considerations in Section 3553(a) "superfluous" to say that the Guidelines incorporate them. Pet. Br. 10; accord FAMM Br. 18-19. There is neither inherent circularity nor incompleteness in the fact that Section 3553(a) refers to the Guidelines. That fact only underscores the reasonableness of using the Guidelines as a reference point. The Guidelines are generalities that reflect the relevant Section 3553(a) factors and are designed to address typical defendants. The sentencing judge must consider the particular defendant's circumstances in light of the statutory factors. But it remains true that the Guidelines account for the most important sentencing factors that judges have historically considered, strive to implement the multiple purposes of sentencing, and incorporate years of fine-tuning based on significant research. As a consequence, the Guidelines ranges ordinarily provide a reliable index of the application of the Section 3553(a) factors.

2. The Guidelines reflect the considered judgment of an expert agency, Congress, and sentencing judges across the country

The Guidelines do not merely incorporate the factors in Section 3553(a); they are "the expert attempt of an experienced body to weigh those factors in a variety of situations." *United States* v. *Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006). As explained in detail in the Commission's brief (at 6-13), the Commission's evaluation of the Section 3553(a) factors is based on nearly two decades of "close attention to federal sentencing policy," *Johnson*, 445 F.3d at 342, and "careful

consideration of the proper sentence for federal offenses," *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005), taking into account "the aggregate sentencing experiences of individual judges" across the country and "the input of Congress" on what sentences and factors promote the SRA's objectives, *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), petition for cert. pending, No. 06-6155 (filed Aug. 24, 2006). In formulating the Guidelines, the Commission "analyzed and considered detailed data drawn from more than 10,000 presentence investigations," as well as "less detailed data on nearly 100,000 federal convictions during a two-year period." *Supplementary Report on the Guidelines* 16. As this Court noted in *Booker*, moreover, the Commission has continued to "collect[] information about actual district court sentencing decisions," to "collect and study appellate court decisionmaking," to "undertak[e] research," and to "revis[e]" and "modify" the Guidelines "in light of what it learns." 543 U.S. at 263-264. Indeed, "Congress necessarily contemplated that the Commission would periodically review the work of the courts" and make "revisions to the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). "It would be an oddity, to say the least, if a sentence imposed pursuant to this congressionally sanctioned and periodically superintended process w[ere] not presumptively reasonable," *Johnson*, 445 F.3d at 342—*i.e.*, if it were not a "generally * * * accurate application of the factors listed in § 3553(a)," *Terrell*, 445 F.3d at 1265.

Petitioner contends that the Guidelines "have developed largely in response to political concerns," not empirical ones, and that Guidelines ranges have therefore moved in only one direction: upward. Pet. Br. 41. It is not obvious that this observation—were it accurate—would demonstrate a deviation from the Section 3553(a) factors or Congress's underlying intent. In any event, petitioner's contention ignores the fact

that a number of Guidelines amendments, including several with broad application, have had the effect of lowering Guidelines ranges. See Sentencing Guidelines § 1B1.10(c) (listing 24 amendments resulting in lower Guidelines ranges that may apply retroactively to defendants already serving sentences). The drug-trafficking guideline, for example, has been amended by the Commission to reduce the upper limit of the Drug Quantity Table from offense level 42 to offense level 38, *id.* App. C, amend. 505 (Nov. 1, 1994); see *id.* § 2D1.1(c)(1); to authorize a two-level reduction in the offense level for defendants who satisfy the "safety valve" criteria, *id.* App. C, amend. 515 (Nov. 1, 1995); see *id.* § 2D1.1(b)(9); and to reduce the base offense level for defendants who receive a mitigating-role adjustment, *id.* App. C, amend. 640 (Nov. 1, 2002); see *id.* § 2D1.1(a)(3). Any suggestion that it would be inappropriate to presume that Guidelines sentences are reasonable because the Guidelines are too harsh is also undermined by the fact that, in all of the cases cited in *Booker* as exemplifying the type of reasonableness review the Court had in mind, 543 U.S. at 262, the courts of appeals approved the decision to impose a sentence *above* the advisory Guidelines range, *ibid.*; see note 3, *supra*.

3. A presumption of reasonableness helps to prevent unwarranted sentencing disparities

a. Before the passage of the SRA, Congress had "delegated almost unfettered discretion to the sentencing judge" to sentence a defendant to any term of imprisonment that fell within a "customarily wide" statutory range. *Mistretta*, 488 U.S. at 364. Under that system,"[s]erious disparities in sentences * * * were common," *id.* at 365, including disparities correlated with constitutionally suspect characteristics like race and sex. See, *e.g.*, Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*,

80 J. Crim. L. & Criminology 883, 883-887 & n.3, 895-897 & nn.73-74, 77 & 82 (1990). Congressional concern about the "shameful disparity in criminal sentences" was a principal reason for the enactment of the SRA. S. Rep. No. 98-225, at 65. In *Booker*, this Court noted repeatedly that Congress's main objective in enacting the SRA was to diminish sentencing disparities,[5] and dissenting Justices made the same observation, see 543 U.S. at 292 (Stevens, J., dissenting in part) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim."). Indeed, that concern is reflected in the text of Section 3553(a) itself. See 18 U.S.C. 3553(a)(6). A presumption that a sentence within the advisory Guidelines range is reasonable on appeal fosters uniformity, thereby "mov[ing] sentencing in Congress' preferred direction," *Booker*, 543 U.S. at 264, without restricting district courts' discretion to impose sentences outside the Guidelines range.

The Guidelines are the only numerical benchmarks in selecting an appropriate sentence; the remaining Section 3553(a) factors have no quantitative values and permit a district court to consider a wide array of facts. "[C]onstruct[ing] a reasonable sentence starting from scratch in every case" would therefore "defeat any chance at rough equality," which "remains a congressional objective." *Jiménez-Beltre*, 440

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[5] See, *e.g.*, 543 U.S. at 250 ("Congress' basic statutory goal" was "a system that diminishes sentencing disparity."); *id.* at 252 ("[T]he sentencing statute's basic aim" was "ensuring similar sentences for those who have committed similar crimes in similar ways."); *id.* at 253 ("Congress' basic goal in passing the [SRA] was to move the sentencing system in the direction of increased uniformity."); *id.* at 255 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing."); *id.* at 256 ("Congress' basic statutory goal" was "uniformity in sentencing."); *id.* at 267 ("Congress' basic objective" was "promoting uniformity in sentencing.").

F.3d at 519. The only practicable way for sentencing courts to fulfill Congress's goal of increasing sentencing uniformity is to anchor their analysis to the Guidelines, which are "an indispensable tool in helping courts achieve [that] mandate." *United States* v. *Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006); see *Booker*, 543 U.S. at 263 (Sentencing Commission "promote[s] uniformity in the sentencing process"). And when a district court exercises its discretion to impose a sentence within the advisory Guidelines range, an appellate presumption that the sentence is reasonable appropriately recognizes that sentences within the Guidelines range are more likely to further Congress's goal of avoiding unwarranted disparities than are sentences outside the range.

b. Petitioner acknowledges that "Congress sought to reduce sentencing disparity overall with passage of the [SRA]" (Br. 36 n.23) but contends that the goal of uniformity should be subordinated to other sentencing objectives. That contention lacks merit.

Petitioner argues that Congress placed primary emphasis on the purposes of sentencing in 18 U.S.C. 3553(a)(2), which "d[o] not include uniformity as a purpose worthy of consideration by the sentencing judge." Br. 15. But Congress intended its specification of the purposes of sentencing to help reduce the disparities that existed under the previous system, which had left "each judge * * * to apply his own notions of the purposes of sentencing." S. Rep. No. 98-225, at 38. Indeed, considerations of undue disparity are inherent in at least some of the sentencing purposes specified in Section 3553(a)(2), because a system that permits significant disparity in sentences imposed on similarly situated offenders fails to "promote respect for the law" or "provide just punishment." 18 U.S.C. 3553(a)(2)(A); see S. Rep. No. 98-225, at 75-76. And 18 U.S.C. 3553(a)(6) explicitly requires that, in deciding what sentence best meets "the purposes * * * in paragraph (2),"

courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Avoiding unwarranted disparities is thus complementary, not subordinate, to the purposes of sentencing in Section 3553(a)(2).

Petitioner also argues (Br. 12-18) that federal sentencing must be guided above all by the so-called "parsimony" provision of Section 3553(a), which directs courts to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes in Section 3553(a)(2). As Chief Judge Boudin has explained, however, that provision is not "an admonition to be lenient." *United States* v. *Navedo-Concepción*, 450 F.3d 54, 58 (1st Cir. 2006). It merely requires courts to impose a sentence that is consistent with the broad purposes in Section 3553(a)(2), most of which "hardly connote less punishment." *Ibid.*

The history of the provision confirms that point. The "sufficient, but not greater than necessary" language was a last-minute amendment to the Senate bill (S. 1762, 97th Cong., 2d Sess. (1984)), which had been made part of a continuing appropriations resolution in the House of Representatives (H.J. Res. 648, 97th Cong., 2d Sess. (1984)). See 130 Cong. Rec. 29,870 (1984). Nothing suggests that the amendment was intended to alter the bill in any fundamental way. On the contrary, as Senator Hatch, a sponsor of the bill, observed, "[t]he language * * * is simply of a clarifying nature. It does not change in any way the policy already contained in the Senate-passed bill." *Id.* at 29,685. Instead, he explained, the language merely reinforces the requirement that sentences "be designed so that they fully meet the various purposes of sentencing. Those purposes cannot be met by sentences that are plainly 'excessive' or by sentences that are plainly insufficient." *Ibid.* Consistent with the legislative history, courts of appeals since *Booker* have uniformly inter-

preted the parsimony provision merely as a directive that the sentence imposed be consistent with the general purposes of sentencing.[6]

c. Petitioner also contends that placing substantial weight on the Guidelines is not an appropriate means for sentencing courts to avoid unwarranted disparities. That contention is likewise without merit.

i. Petitioner argues that, before adding the language that became 18 U.S.C. 3553(b)(1) (Supp. IV 2004) (and made the Guidelines mandatory), Congress expected that the Guidelines range would be "merely one of several considerations relevant to sentencing." Br. 16. He suggests that *Booker*'s excision of that language therefore eliminated any basis for giving the Guidelines greater weight than any other factor in Section 3553(a). Br. 16-18. Contrary to petitioner's claim, and putting to one side the inherent difficulties in ascertaining the evolution of Congress's intent, the SRA's history, purpose, and structure demonstrate that Congress intended that substantial weight be given to the Guidelines even before it added the language that became Section 3553(b)(1).

That language first appeared in a floor amendment to S. 1437, 95th Cong., 1st Sess. (1977) (entitled "Criminal Code Reform Act of 1977"), a precursor to the SRA. See 124 Cong. Rec. 382-383 (1978). The amendment, which was not controversial, received very limited debate, and was passed by voice vote. See *ibid.* It was clearly not intended as a radical change in the role or weight of the Guidelines. It was intended

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[6] See *United States* v. *Smith*, No. 06-4358, 2006 WL 3823174, at *2 (4th Cir. Dec. 29, 2006) (parsimony provision does not require conclusion that sentence at bottom of Guidelines range is sufficient to satisfy purposes of Section 3553(a)); *United States* v. *Dragon*, 471 F.3d 501, 506 (3d Cir. 2006) (parsimony provision does not require district court to state that sentence imposed is minimum sentence necessary to satisfy purposes of Section 3553(a)); *Navedo-Concepción*, 450 F.3d at 57-58 (same).

merely to make more explicit the existing understanding of the bill, as both Senator Hart, the sponsor of the amendment, and Senator Kennedy, the principal sponsor of the bill, made clear. See, *e.g.*, *id.* at 383 (statement of Sen. Hart) ("all this amendment does is state the obvious effect of what the entire purpose of the bill is"); *ibid.* (statement of Sen. Kennedy) ("it makes clearer what was the basic understanding of the members of the committee that support the legislation").

That Congress always intended the Guidelines to be given substantial weight in sentencing is confirmed by the Committee Report on S. 1437. Explaining the version of the bill that existed *before* the addition of what became Section 3553(b)(1), the Report said the following:

> [The bill] requires that, if the sentence is outside the range set out in the sentencing guidelines, the court state the specific reason that the sentence imposed is outside the range. [This] requirement would essentially be a statement of why the court felt that the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it would have promulgated a different range.

S. Rep. No. 95-605, at 892-893 (1977). The Report also expressed the Committee's "expect[ation]" that "most sentences will fall within the ranges recommended in the sentencing guidelines." *Id.* at 1056.

That Congress intended the Guidelines to be given substantial weight even before the addition of what became Section 3553(b)(1) is confirmed by two additional facts. First, one of the primary purposes of the legislation was to create a Sentencing Commission and Sentencing Guidelines. It is unlikely that Congress would have invested resources in establishing the Commission and the Guidelines if the Guidelines were to have no greater weight than the other factors in what became Section 3553(a). Second, one of the key structural aspects of the legislation was the establishment of limited judicial review of sentences and a related requirement that district courts explain the basis for sentencing defendants outside the Guidelines range. Those provisions were present in early bills, before the addition of what became Section 3553(b)(1), and operated to reinforce the role and weight of the Guidelines under what became Section 3553(a)(4) and (5). See, *e.g.*, S. Rep. No. 95-605, at 883 ("The [bill] encourages adherence to the guidelines by requiring that all sentences outside the guidelines be accompanied by a statement of reasons justifying the deviation and by requiring that all such sentences be subject to appellate review.").

ii. Petitioner and a number of his amici also claim that the Guidelines as written have not succeeded in fostering uniformity in sentencing. They argue that defendants who should be treated similarly are often treated differently, principally because of regional differences in the application of the Guidelines, differences in charging and plea-bargaining practices, differences in the Guidelines' treatment of crack cocaine and powder cocaine, and differences between the Guidelines' treatment of defendants who are classified as "career offenders" and defendants who are not. Pet. Br. 35-37; Law Professors Who Study Sentencing Reform (LPWSSR) Br. 15-16; NACDL Br. 18-21; NYCDL Br. 19-22. As explained at greater length in the Sentencing Commission's brief (at 26-

30), petitioner's general claim is refuted by "[r]igorous statistical study both inside and outside the Commission," which "confirm[s] that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted sentencing disparity arising from differences among judges." United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 140 (2004) (*Fifteen Years of Guidelines Sentencing*). As explained below, petitioner's more specific arguments are likewise without merit.

Studies have shown that "legally relevant differences among cases explain the vast majority of variation among * * * regions in sentence length." *Fifteen Years of Guidelines Sentencing* 101. And although it is true that disparities in sentencing may result from differences in charging and plea-bargaining practices, the Guidelines, as *Booker* recognized, "try to move the system in the right direction, *i.e.*, toward greater sentencing uniformity," 543 U.S. at 256, by requiring that sentences be based on "relevant conduct," not merely charged conduct, and by helping sentencing judges decide whether to reject a plea agreement that does not reflect all relevant conduct, Sentencing Guidelines § 1B1.3; *id.* Ch. 6, Pt. B. The Department of Justice has also taken steps to address disparities that may arise from charging and plea-bargaining decisions. See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors (Sept. 22, 2003) <http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm> (Department policy concerning charging criminal offenses, disposition of charges, and sentencing).

As for the drug-trafficking guideline's crack-powder ratio and the career-offender provision, Sentencing Guidelines §§ 2D1.1(c) and 4B1.1, each reflects a congressional judgment

about appropriate sentencing policy. The former reflects a "policy decision that crack offenders should be punished more severely" and a "choice as to how much more severe the punishment should be," *United States* v. *Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006), petition for cert. pending, No. 06-7352 (filed Oct. 19, 2006); see 21 U.S.C. 841(b) (2000 & Supp. III 2003); the latter reflects a "policy [decision] that repeat drug offenders receive sentences 'at or near' the * * * statutory maximum[]," *Williams*, 456 F.3d at 1370; see 28 U.S.C. 994 (2000 & Supp. III 2003). Sentencing disparities that arise from congressional policy judgments are not "unwarranted."

Finally, even if the Guidelines have not fully achieved the sentencing uniformity that Congress intended, according judges unfettered discretion in sentencing could hardly be thought a means of reducing unwarranted disparities. On the contrary, studies have shown that, under the mandatory Guidelines system, "[w]hen disparity [wa]s found, it [wa]s more prevalent in cases receiving a departure than in cases sentenced within the guideline range." *Fifteen Years of Guidelines Sentencing* 118.

4. A Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing Commission that the sentence complies with the factors in 18 U.S.C. 3553(a)

As *Booker* emphasized, although the Guidelines are now advisory, district courts are still required to "consult th[e] Guidelines and take them into account when sentencing." 543 U.S. at 264; see 18 U.S.C. 3553(a)(4) and (5) (Supp. IV 2004). To "consult" the Guidelines, a district court must first correctly determine the advisory Guidelines range. See, *e.g.*, *United States* v. *Mix*, 457 F.3d 906, 911 (9th Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006);

United States v. *Dixon*, 449 F.3d 194, 204 (1st Cir. 2006). The court must then consider the other sentencing factors in Section 3553(a) and determine, based on the facts and circumstances of the case, the appropriate sentence for the defendant. See *Booker*, 543 U.S. at 245-246.

When a district court decides to impose a sentence within the Guidelines range, the court has determined that such a sentence complies with the factors in Section 3553(a). The sentencing judge's individualized agreement with the determination of the Sentencing Commission is significant. It means that two actors, occupying different positions in the sentencing system and approaching the question at different levels of generality, have jointly determined that a Guidelines sentence is appropriate—both in general, as applied to the "applicable category of offense committed by the applicable category of defendant," 18 U.S.C. 3553(a)(4)(A) (Supp. IV 2004), and in particular, as applied to the individual defendant in that case. The presumption of reasonableness "respects the alignment of the[se] views." *Buchanan*, 449 F.3d at 736 (Sutton, J., concurring).

Petitioner contends that this rationale "begs the question of whether the * * * within-Guidelines sentence was reasonable in light of the other factors * * * in § 3553(a)" and "produces only one result—affirmance." Pet. Br. 28. But the fact that the sentencing judge and the Sentencing Commission have each determined that the Section 3553(a) factors warrant a sentence within the Guidelines range does not mean that the sentence imposed is *per se* reasonable and must be affirmed. It means only that the sentence should be *presumed* to be reasonable on appeal; the sentence will still be subject to vacatur if the party challenging it can demonstrate that it is substantively unreasonable in light of the Section 3553(a) factors as applied to the particular record.

C. According A Presumption Of Reasonableness To Within-Guidelines Sentences Does Not Make The Guidelines Effectively Mandatory

1. *Booker*'s holding that the Sentencing Guidelines violate the Sixth Amendment "rest[ed] on the premise" that the Guidelines were "mandatory and impose[d] binding requirements on all sentencing judges." 543 U.S. at 233; accord *id.* at 259. Applying a presumption of reasonableness to within-Guidelines sentences does not reinstitute a mandatory Guidelines regime, in contravention of *Booker*'s Sixth Amendment holding. If a sentence within the Guidelines range is treated as presumptively reasonable, "it does not follow that a sentence outside the guidelines range [will be] unreasonable." *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006). It does not even follow that such a sentence will be *presumed* unreasonable. On the contrary, "there is no presumption of unreasonableness that attaches to a sentence that varies from the [Guidelines] range." *United States* v. *Jordan*, 435 F.3d 693, 698 (7th Cir.) (emphasis omitted), cert. denied, 126 S. Ct. 2050 (2006); accord, *e.g.*, *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1238-1239 (10th Cir. 2006); *United States* v. *Foreman*, 436 F.3d 638, 644 (6th Cir. 2006). Even if *that* presumption could be thought to "transform an 'effectively advisory' system * * * into an effectively mandatory one," *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.) (quoting *Booker*, 543 U.S. at 245), cert. denied, 126 S. Ct. 2054 (2006), a presumption that a within-Guidelines sentence is reasonable is fundamentally different, and has no such effect.

2. One of petitioner's amici essentially acknowledges that a presumption of reasonableness for within-Guidelines sentences does not make the Guidelines mandatory. See NACDL Br. 7 n.3 ("It may well be that in theory a 'presumption of reasonableness' for Guidelines sentences * * * does not raise

* * * Sixth Amendment concerns if it does not * * * equate with a 'presumption of *unreasonableness*' for *non*-Guidelines sentences."). But petitioner himself contends otherwise, Br. 6-7, 28-35, as do a number of his other amici, FPCD Br. 28; LPWSSR Br. 13; Miller Br. 10; NYCDL Br. 7-9, 13-15. Their arguments lack merit.

a. Petitioner argues that presuming a within-Guidelines sentence to be reasonable "places an additional burden on the district court to justify [a] non-Guidelines sentence[]," by requiring "an additional explanation" why the factors considered by the court are "sufficient" to warrant a non-Guidelines sentence. Br. 33. Echoing that view, one of petitioner's amici argues that a presumption of reasonableness means that district courts must follow the Guidelines unless "the defendant can prove that a guidelines sentence is inappropriate." NYCDL Br. 13. Another group of amici goes even further, suggesting that a presumption of reasonableness means that district courts cannot impose a non-Guidelines sentence unless there is a ground for a departure. Miller Br. 10.

Those assertions are simply wrong. As Chief Judge Easterbrook has explained, "[t]o say that a sentence within the [Guidelines] range presumptively is reasonable is not to say that district judges ought to impose sentences within the range." *United States* v. *Gama-Gonzales*, 469 F.3d 1109, 1110 (7th Cir. 2006) (emphasis omitted). "It is only to say that, *if* the district judge does use the Guidelines, then the sentence is unlikely to be problematic." *Ibid.*[7]

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[7] Petitioner also argues that the presumption of reasonableness "unduly burdens" a party appealing a within-Guidelines sentence with "the nearly impossible task of proving a negative." Br. 33-34. But whether a Guidelines sentence is presumed reasonable or not, *Booker*'s standard of review *necessarily* requires an appellant to "prove a negative"—*i.e.*, that the sentence imposed was *not* reasonable.

b. Noting that appellate courts almost always affirm within-Guidelines sentences when the defendant appeals and often vacate below-Guidelines sentences when the government appeals (Br. 30-32), petitioner argues that those decisions impose "a *de facto* restraint on [district] courts" (Br. 7) by deterring them from sentencing outside the Guidelines range. It would be astonishing to assume, however, that sentencing courts will routinely abandon their obligation under *Booker* to treat the Guidelines as advisory and consider all the Section 3553(a) factors, and instead "return to the pre-*Booker* mandatory Guidelines," *ibid.*, simply to minimize the rigor of appellate review. This Court has previously rejected "any presumption that a decision of this Court will 'deter' lower federal * * * courts from fully performing their sworn duty," *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993), and it should likewise reject any presumption that decisions of courts of appeals will lead district judges to "ignor[e] their oath," *ibid.*, in order to increase their chances of being affirmed.

c. Petitioner nevertheless insists that a district judge who was "once, or twice, reversed for sentencing outside the Guidelines" would "reasonably conclude" that the law "all but require[d] him or her to impose a sentence within the Guidelines" range. Br. 30. That argument ignores the reality that —whatever the standard of review—the government does not reflexively appeal whenever there is a below-Guidelines sentence. Between February 1, 2005 (the beginning of the first month after *Booker* was decided) and September 30, 2006 (the latest date for which preliminary data have been released), district courts imposed more than 14,000 below-Guidelines sentences that were not the result of a government-sponsored departure. App., *infra*, 31a. Yet the government appealed fewer than 300 of those sentences on the ground of unreasonableness, or approximately 2%. See also FPCD Br. App. A11-

A17 (identifying 83 decisions on government appeals of below-Guidelines sentences between December 1, 2005, and November 30, 2006); NYCDL Br. App. 5a-6a (identifying 71 decisions on government appeals of below-Guidelines sentences between January 1, 2006, and November 16, 2006). Even if one indulges the assumption that district judges focus on the likelihood of an appeal being filed and the relative rigor of appellate review, a judge would conclude that a below-Guidelines sentence would not precipitate an appeal, let alone reversal.

Moreover, in the relatively few cases in which the government has appealed a below-Guidelines sentence, if the sentence is vacated, the court of appeals has not held that the district judge acted unreasonably in failing to impose a Guidelines sentence. In the vast majority of such cases, the basis for the decision is either that the sentence was *too far* below the Guidelines range or that the district court's explanation for the below-Guidelines sentence was inadequate. See, *e.g.*, *Cage*, 451 F.3d at 596 (although facts of case might "justify some discrepancy from the advisory guidelines range," they were "not dramatic enough to warrant such an extreme downward variance"); *Myers*, 439 F.3d at 419 (remanding for "imposition of sentence following more explicit and thorough consideration" of the Section 3553(a) factors, "without expressing any opinion on the reasonableness of the sentence that should be imposed").

d. Even if it were true, as petitioner contends, that the "consistent affirmance of within-Guidelines sentences" (Br. 30) encouraged district courts to sentence within the Guidelines range, that phenomenon could not be the result of the application of a presumption of reasonableness. As petitioner acknowledges, *all* the courts of appeals, whether they apply such a presumption or not, have affirmed almost all within-Guidelines sentences as reasonable. Br. 30-31; see note 2, *supra*. Indeed, petitioner and his amici identify only one

court of appeals decision that vacated a within-Guidelines sentence on the ground that it was "substantively unreasonable," Br. 31; see NYCDL Br. 5; NYCDL Br. App. 3a, 156a, and that decision was issued by a court—the Eighth Circuit—that applies the presumption. See *United States* v. *Lazenby*, 439 F.3d 928, 933-934 (2006). Rather than being a product of the presumption of reasonableness, the courts of appeals' "consistent affirmance of within-Guidelines sentences" (Pet. Br. 30) reflects the sensible conclusion that a sentence within the Guidelines range will virtually always fall within the range of reasonableness.

Petitioner notes that district courts in circuits that apply a presumption of reasonableness "impose below-Guidelines sentences in one-third fewer cases than [district] courts in other circuits." Pet. Br. 32; see FPCD Br. 12-13; FPCD Br. App. A1. But that disparity cannot be attributed to the presumption either, because it existed long before *Booker*. Indeed, the disparity has actually *decreased* since *Booker*. During the four fiscal years preceding this Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), district courts in the five circuits that have not adopted a presumption of reasonableness imposed below-Guidelines sentences in 10.7% of cases, compared with 6.9% of cases in circuits that have. App., *infra*, 31a. Since *Booker*, district courts in non-presumption circuits have imposed below-Guidelines sentences in 14.5% of cases, compared with 10.8% of cases in presumption circuits. *Ibid.* Thus, while district courts in non-presumption circuits have imposed below-Guidelines sentences at a rate about *one third* higher than the rate in presumption circuits *since Booker*, district courts in non-presumption circuits imposed below-Guidelines sentences at a rate about *one half* higher than the rate in presumption circuits *before Booker*. The higher rate of below-Guidelines sentences in the non-presumption circuits is traceable, not to their decision not

to adopt a presumption of reasonableness for within-Guidelines sentences, but to the consistently high rate of below-Guidelines sentencing in the Second and Ninth Circuits, which together account for well over half the sentences in non-presumption jurisdictions. See *ibid.*

Nor do the data suggest that, in circuits that apply a presumption of reasonableness, more below-Guidelines sentences were imposed before the adoption of the presumption than after. On the contrary, data collected by the Sentencing Commission indicate that the rate of below-Guidelines sentencing has remained remarkably stable since *Booker*, both in circuits that have adopted a presumption of reasonableness and in those that have not. See USSC Br. App. 2a-13a.

II. WHEN A DISTRICT COURT IMPOSES A SENTENCE WITHIN THE GUIDELINES RANGE AND COMPLIES WITH THE REQUIREMENT OF 18 U.S.C. 3553(c) TO STATE THE REASON FOR THE SENTENCE, THE COURT NEED NOT EXPLICITLY ANALYZE ALL OF THE SECTION 3553(a) FACTORS AND OTHER FACTORS THAT MIGHT JUSTIFY A LESSER SENTENCE

A. The SRA Requires Only A General Explanation For A Sentence Within The Guidelines Range

1. Section 3553(c) of Title 18 directs district courts to state, at the time of sentencing, the reasons for the sentence imposed. Although Section 3553(c) requires a statement of "the reasons for [the] imposition of the particular sentence" in all cases, 18 U.S.C. 3553(c) (2000 & Supp. IV 2004), it requires a statement of "the *specific* reason for the imposition of [the] sentence" only when the sentence is outside the Guidelines range, 18 U.S.C. 3553(c)(2) (Supp. IV 2004) (emphasis added). The statute thus makes clear that a *general* statement of reasons is sufficient for within-Guidelines sentences. *Booker* did not excise or otherwise alter Section

3553(c). See, *e.g.*, *United States* v. *Miqbel*, 444 F.3d 1173, 1177 n.6 (9th Cir. 2006); *United States* v. *Lewis*, 424 F.3d 239, 244 (2d Cir. 2005); *United States* v. *Hughes*, 401 F.3d 540, 546 n.5 (4th Cir. 2005); see also *Booker*, 543 U.S. at 305 (Scalia, J., dissenting in part).[8]

When a district court imposes a sentence within the Guidelines range, no detailed statement is necessary to comply with Section 3553(c)'s directive that the court provide general reasons for the sentence. The Guidelines generally reflect an accurate application of the Section 3553(a) factors, see Point I.B, *supra*, and a district court's imposition of a within-Guidelines sentence indicates that the court agreed with the Sentencing Commission's assessment of the statutory factors as applied to the facts of the case. For that reason, a Guidelines sentence requires "little explanation." *E.g.*, *United States* v. *Sam*, 467 F.3d 857, 864 (5th Cir. 2006); *United States* v. *Tyra*, 454 F.3d 686, 688 (7th Cir. 2006).

2. Nor does the obligation imposed by Section 3553(a) to "consider" the factors listed there create any independent obligation to address those factors explicitly or provide a more specific statement of reasons for a within-Guidelines sentence. Although a district court may choose to discuss particular factors, "no specific verbal formulations" are necessary to "demonstrate the adequate discharge of the duty to 'consider' matters relevant to sentencing." *United States* v. *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (Newman, J.).[9] That

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[8] Section 3553(c) also requires that, when the Guidelines range exceeds 24 months, the district court give "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. 3553(c)(1). Because petitioner's Guidelines range was 33 to 41 months, that provision does not apply here.

[9] See, *e.g.*, *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006) (no requirement that court "explain on the record how the § 3553(a) factors justify the sentence"), petition for cert. pending, No. 06-5217 (filed July 7, 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (district

is especially true when the district court chooses to sentence within the Guidelines range.

Indeed, in the absence of contrary indications in the record, a court of appeals may presume that the district court understood its obligations and adequately considered the Section 3553(a) factors, since "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds by *Ring* v. *Arizona*, 536 U.S. 584 (2002). As long as "the [district] judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable," and "nothing in the record indicates misunderstanding about such materials or misperception about their relevance," it is appropriate to conclude that "the requisite consideration [of the Section 3553(a) factors] has occurred." *Fleming*, 397 F.3d at 100. Accordingly, when a district court imposes a within-Guidelines sentence and complies with Section 3553(c)'s requirement that it state "the reasons for its imposition of the particular sentence," the court is ordinarily not required to provide a further explanation of its weighing of the Section 3553(a) factors to establish that they have been considered.

Contrary to petitioner's contention (Br. 42-43, 45-46), *United States* v. *Taylor*, 487 U.S. 326 (1988), does not support the view that district courts must articulate their consideration of the Section 3553(a) factors on the record. In *Taylor*, the Court addressed the standard for reviewing a district

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court's consideration of Section 3553(a) factors "need not be evidenced explicitly"), petition for cert. pending, No. 06-5275 (filed July 11, 2006); *United States* v. *Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005) ("nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors"); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.) ("checklist" not required).

court's dismissal of an indictment with prejudice under the Speedy Trial Act of 1974, 18 U.S.C. 3162(a). The Court held that, in light of the statute's text and legislative history, district courts must articulate on the record how they evaluated the statutory factors in deciding whether to dismiss a case with or without prejudice. *Taylor*, 487 U.S. at 336-337, 342-343. The SRA differs from the Speedy Trial Act, in that the SRA specifically directed the Sentencing Commission to formulate Guidelines that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)," 28 U.S.C. 991(b)(1)(A), and a correctly calculated Guidelines range already "takes into account" the factors set forth in Section 3553(a), *United States* v. *Scott*, 426 F.3d 1324, 1330 (11th Cir. 2005). Because the Section 3553(a) factors are "built into the Guidelines," *Johnson*, 445 F.3d at 343, a district court that exercises its discretion to impose a sentence within the Guidelines range need not explicitly discuss those factors.

B. The District Court Need Not Explicitly Address Every Argument That Might Justify A Sentence Outside The Guidelines Range

Section 3553 of Title 18 requires a district court to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing in Section 3553(a)(2), 18 U.S.C. 3553(a) (2000 & Supp. IV 2004); to "consider," in determining an appropriate sentence, the factors listed in Section 3553(a), *ibid.*; and to "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). But neither Section 3553 nor any other statute requires a district court to address every argument for a sentence higher or lower than the one imposed. Accordingly, if a district court decides to impose a sentence within the Guidelines range, and complies with the requirements of Section 3553, the court need not consider and

reject every argument for a sentence outside the range. A number of courts of appeals have correctly so held. See, *e.g.*, *United States* v. *Turbides-Leonardo*, 468 F.3d 34, 40 (1st Cir. 2006); *United States* v. *Jones*, 445 F.3d 865, 871 (6th Cir.), cert. denied, 127 S. Ct. 251 (2006); *United States* v. *Fernandez*, 443 F.3d 19, 30 (2d Cir.) (Cabranes, J.), cert. denied, 127 S. Ct. 192 (2006).

Other courts of appeals, however, require district courts to address any ground for a non-Guidelines sentence that is not obviously without merit. See *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1116-1118 (10th Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 329 (3d Cir. 2006); *United States* v. *Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). The apparent justification for that requirement is that sentencing after *Booker* is discretionary and that a court of appeals "ha[s] to satisfy [itself], before [it] can conclude that the [district] judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." *Cunningham*, 429 F.3d at 679. That requirement, as a general rule, is unfounded. A general requirement that a district court must explicitly address every non-frivolous argument for leniency lacks any basis in the sentencing statute.

In any event, even the courts that have imposed such a requirement recognize that district courts need not address *every* argument for a higher or lower sentence. As one of those courts has put it, "[a] sentencing judge has no more duty than * * * appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *Cunningham*, 429 F.3d at 678; accord *Sanchez-Juarez*, 446 F.3d at 1117; *Cooper*, 437 F.3d at 329. At least one of those courts has also recognized that "[a] response by the district court [i]s not required" when the party seeking a

higher or lower sentence "perfunctorily raise[s] only run-of-the-mill contentions." *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1223 (10th Cir. 2006), petition for cert. pending, No. 06-5217 (filed July 7, 2006). And even when a party makes an argument that those courts would require to be addressed, it can often be inferred from the record as a whole that the argument was considered and rejected, despite the absence of any explicit statement to that effect by the district court. See *Jiménez-Beltre*, 440 F.3d at 519 ("a court's reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did").

Accordingly, as long as the record, viewed as a whole, does not indicate that the district court failed to give independent consideration to the Section 3553(a) factors, and as long as the district court provided a general statement of the reasons for the sentence as required by Section 3553(c), a sentence within the correctly calculated Guidelines range should not be set aside as procedurally unreasonable for failure to address explicitly particular arguments for a lesser sentence. Instead, the court of appeals should affirm unless the appellant can show that the facts and circumstances of the case are such that the Section 3553(a) factors required a sentence outside the Guidelines range.

III. PETITIONER'S SENTENCE, AT THE BOTTOM OF THE GUIDELINES RANGE, WAS REASONABLE

The district court sentenced petitioner to 33 months of imprisonment, the bottom of the advisory Guidelines range. Nothing in the record indicates that the court did not exercise its discretion on the basis of the Section 3553(a) factors, and the district court provided an adequate statement of reasons for the sentence under Section 3553(c). Petitioner's within-Guidelines sentence, moreover, is entitled to a presumption of

reasonableness, and he cannot rebut the presumption. The sentence should therefore be affirmed.

A. The District Court Considered The Factors In 18 U.S.C. 3553(a)

There is no "record evidence suggesting" that the district court did not "faithfully discharge[] [its] duty to consider the statutory factors" in sentencing petitioner. *Fernandez*, 443 F.3d at 30. On the contrary, the record affirmatively shows that the district court considered the factors in Section 3553(a).

At the sentencing hearing, after ascertaining that petitioner was not challenging the PSR's calculation of the Guidelines range, J.A. 49-50, the district court asked petitioner's counsel whether he was going to offer evidence to show that, "under 3553, your client would be entitled to a different sentence than he should get under sentencing guidelines," J.A. 52, and it reminded counsel that "under 3553 you * * * have a right to show why your client should be considered for a sentence of less than he would get under the guidelines," J.A. 53. The court then heard from petitioner's counsel at length with respect to the considerations that, in petitioner's view, warranted a below-Guidelines sentence—namely, his military service, physical condition, and asserted vulnerability to abuse in prison. J.A. 51-73. During the course of those remarks, the court actively questioned counsel about his arguments and closely examined the evidence he submitted.[10] The court also confirmed the three grounds on which petitioner

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[10] See J.A. 56-62 (examining records relating to petitioner's testimony in other criminal cases and clarifying petitioner's claim that he "should be treated differently" because he might be "subject to retribution" in prison); J.A. 63-66 (questioning counsel about petitioner's military service); J.A. 66-73 (reviewing medical records and inquiring whether there was "medical evidence" indicating which of petitioner's symptoms were caused by exposure to Agent Orange).

was relying for "a departure from the guidelines or a sentence under 3553 that is lower than the guidelines." J.A. 64-65. Thus, even without a presumption that a sentencing court has considered the Section 3553(a) factors, the record demonstrates that that those factors were considered here. The district court explicitly recognized its authority to impose a below-Guidelines sentence based on the factors in Section 3553(a), and gave petitioner a full and fair opportunity to identify any relevant considerations that would make a below-Guidelines sentence appropriate. The court then carefully considered the evidence and arguments that petitioner presented.

The record thus refutes petitioner's contention that the district court "considered only * * * the Guidelines range" (Br. 19) and "ignored" the other factors in Section 3553(a) (Br. 8). Petitioner's other contentions are mistaken as well.

First, petitioner contends that the district court did not give consideration to the Section 3553(a) factors other than the Guidelines range because the court was "compelled by circuit precedent to view * * * the Guidelines range as presumptively correct." Br. 20. The Fourth Circuit has not held, however, that a Guidelines sentence is presumptively *correct* in the *district court*, in the sense that a court *must* impose such a sentence unless the defendant (or the government) can "justify a sentence outside of the recommended Guidelines range." *Ibid.* It has only held that, if the district court *chooses* to impose a Guidelines sentence in the exercise of its discretion, the sentence is presumptively *reasonable* in the *court of appeals*. And the Fourth Circuit did not adopt even *that* presumption until eight months *after* the sentence in this case was imposed. See *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006). There is thus no Fourth Circuit precedent to support petitioner's con-

tention that the district court believed itself bound to consider only the Guidelines.

Second, petitioner contends (Br. 3, 21-22 & n.11) that the district court did not properly consider even the Guidelines, because, according to petitioner, the court should not have used the accessory-after-the-fact guideline, Section 2X3.1, which resulted in a higher offense level. That challenge has been waived, however, because petitioner conceded in the district court that the Guidelines range was correctly calculated. J.A. 49-50. In any event, the contention lacks merit. The district court applied the accessory-after-the-fact guideline, not because it "found," without evidence, that petitioner "was an accessory after the fact" to InterOrdnance's crime, as petitioner contends, Br. 22 n.11, but because the perjury and obstruction-of-justice guidelines each direct the sentencing court to apply the accessory-after-the-fact guideline when the perjury or obstruction of justice involved a "criminal offense," Sentencing Guidelines §§ 2J1.2(c)(1), 2J1.3(c)(1), and the crimes of which petitioner was found guilty were committed in connection with a grand-jury investigation.

Nor did petitioner take the position in the district court that a below-Guidelines sentence was warranted because the accessory-after-the-fact guideline overstates the seriousness of his crimes. And the court's obligation to consider the Section 3553(a) factors did not require it to "search for grounds not clearly raised on the record" that might support a sentence outside the Guidelines range. *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006). In any event, the cross-references to the accessory-after-the-fact guideline reflect the Sentencing Commission's reasonable view that perjury or obstruction of justice that involves a criminal offense should be punished more severely than perjury or obstruction of justice that does not, and that the severity of punishment

should vary with the gravity of the underlying obstructed crime.

B. The District Court Adequately Explained Its Sentence

The district court also complied with its obligation to state "the reasons for the imposition of the particular sentence." 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). During its colloquy with petitioner's counsel, the court questioned the nature and extent of the assistance petitioner had provided in other investigations. J.A. 57-58. It likewise questioned whether petitioner had "performed such good and extraordinary service for our country that he is entitled to special treatment." J.A. 65. And the court observed that "the federal prison system is equipped to handle people with diabetes and many other difficult [medical conditions]." J.A. 71. Then, in announcing its sentence, the court stated that the crimes of which petitioner was convicted were "serious matters" and that, "under 3553, certainly the public needs to be protected." J.A. 86-87; see 18 U.S.C. 3553(a)(2) (requiring court to consider need for sentence to "reflect the seriousness of the offense" and "protect the public"). Together with the court's comments in response to petitioner's arguments, those statements provided a sufficient explanation of the court's conclusion that, in light of the seriousness of petitioner's crimes, and despite the mitigating circumstances that petitioner identified, a sentence within the Guidelines range was appropriate.

The court's statement of reasons surely could have been lengthier, or more detailed. But it did not have to be. The district court's decision to impose a Guidelines sentence necessarily reflected its agreement with the Sentencing Commission's application of the Section 3553(a) factors to the case, and the sentence therefore required "little explanation." *E.g.*, *Sam*, 467 F.3d at 864; *Tyra*, 454 F.3d at 688.

Petitioner contends that the statement of reasons was inadequate because the district court "did not resolve open evidentiary issues in the record, including the nature of Mr. Rita's medical conditions or his military and civil service." Br. 48. But there were no such issues to resolve, inasmuch as the facts supporting petitioner's arguments for a below-Guidelines sentence were undisputed. See, *e.g.*, J.A. 73. The district court must therefore be understood, not to have disregarded the facts proffered by petitioner, but to have concluded that they did not warrant leniency.

C. Petitioner Cannot Rebut The Presumption That The Within-Guidelines Sentence Was Reasonable

The district court considered the factors in Section 3553(a) and provided an adequate statement of reasons under Section 3553(c), and its within-Guidelines sentence is entitled to a presumption of reasonableness on appeal. Petitioner cannot rebut that presumption.

As the prosecutor pointed out at sentencing, the essential "nature and circumstances of the offense" (18 U.S.C. 3553(a)(1)) is that petitioner obstructed an investigation into the unlawful importation of machine guns. J.A. 74-75. As the district court explicitly found, that is a "serious" crime. J.A. 86. As the prosecutor also pointed out at sentencing, "the history and characteristics of the defendant" (18 U.S.C. 3553(a)(1)), in addition to the characteristics identified by petitioner, are that he was previously convicted of "lying on firearm permit applications," J.A. 76, and committed both the present crimes and the prior crime while working as a federal immigration official, J.A. 76-77. Moreover, far from accepting responsibility for his crimes at sentencing, petitioner continued to insist that he was innocent, J.A. 80-85; accused the ATF agent of perjury and the prosecutor of intentionally misleading the grand and petit juries, J.A. 79, 85; and claimed to

be the "victim" of "a modern day * * * Inquisition," J.A. 80. Under these circumstances, a sentence at the low end of the advisory Guidelines range was not unreasonable.

Petitioner contends that his personal characteristics "clearly support a lesser sentence," Br. 21, but that contention is not nearly sufficient to rebut the presumption that a within-Guidelines sentence is reasonable. The fact that certain considerations "support" a lower sentence does not mean that they *require* one. Had the district court been persuaded by petitioner's arguments and imposed a lower sentence, its sentence might well have been reasonable. But the fact that, in the exercise of its discretion, the district court rejected petitioner's arguments and imposed a higher sentence does not mean that its sentence was *un*reasonable. As Judge Posner has explained, "reasonableness is a range, not a point." *Cunningham*, 429 F.3d at 679. For the reasons stated in Point I.B, *supra*, it would be a rare case in which the Guidelines range is not within the "broad range of reasonable[ness]," *Fernandez*, 443 F.3d at 34, and it would be a rarer case in which the *bottom* of the Guidelines range is not within that range. This is not such a case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 (2000 & Supp. IV 2004) provides:

> **Imposition of a sentence**
>
> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy

statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

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[1] So in original. The period probably should be a semicolon.

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing**—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

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[2] So in original. No subpar. (B) has been enacted.

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

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[3] So in original. The second comma probably should not appear.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendants substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

3. Section 3742 of Title 18 (2000 & Supp. IV 2004) provides:

Review of a sentence

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or

includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant

to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 991 of Title 28 (2000 & Supp. IV 2004) provides:

United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the

same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney Generals designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sen-

tencing as set forth in section 3553(a)(2) of title 18, United States Code.

5. Section 994 of Title 28 (2000 & Supp. IV 2004) provides:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

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[1] So in original. Probably should be "incidence."

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[2] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

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[2] So in original. Probably should be "incidence."

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the

defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commis-

sion of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United

States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 9/30/2006	
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**	
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**812**	
Below-Range Sentences	22	8.5%	24	5.8%	21	4.4%	20	4.9%	87	5.6%	111	13.7%
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**	
Below-Range Sentences	145	9.8%	158	8.7%	143	7.8%	66	5.2%	512	8.0%	421	16.4%
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**7,301**	
Below-Range Sentences	683	17.4%	692	17.0%	764	16.0%	465	13.6%	2,604	16.1%	1,768	24.2%
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**5,128**	
Below-Range Sentences	201	7.8%	194	7.3%	206	7.4%	115	5.5%	716	7.1%	859	16.8%
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**10,333**	
Below-Range Sentences	228	4.8%	197	3.9%	216	3.8%	128	3.1%	769	3.9%	1,125	10.9%
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,506**	
Below-Range Sentences	1,563	14.0%	1,360	11.1%	999	7.5%	361	3.7%	4,283	9.2%	1,952	7.7%
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**	
Below-Range Sentences	261	6.2%	240	5.4%	256	5.3%	175	5.1%	932	5.5%	1,245	14.6%
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**	
Below-Range Sentences	139	5.8%	180	6.7%	136	4.5%	82	3.7%	537	5.2%	740	14.8%
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**8,214**	
Below-Range Sentences	319	9.2%	335	9.4%	308	7.1%	165	4.7%	1,127	7.6%	1,166	14.2%
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**20,658**	
Below-Range Sentences	1,944	16.3%	2,016	17.2%	1,311	9.9%	596	6.4%	5,867	12.7%	2,557	12.4%
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**9,548**	
Below-Range Sentences	230	7.7%	286	7.5%	246	5.5%	165	4.4%	927	6.2%	1,008	10.6%
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**	
Below-Range Sentences	392	6.6%	372	6.0%	290	4.5%	160	3.3%	1,214	5.2%	1,107	10.3%
Presumption Circuits	**29,247**		**32,182**		**36,108**		**27,281**		**124,818**		**67,939**	
Below-Range Sentences	2,762	9.4%	2,622	8.1%	2,182	6.0%	1,096	4.0%	8,662	6.9%	7,347	10.8%
Other Circuits	**25,842**		**26,502**		**29,063**		**20,970**		**102,377**		**46,379**	
Below-Range Sentences	3,365	13.0%	3,432	12.9%	2,714	9.3%	1,402	6.7%	10,913	10.7%	6,712	14.5%
Comparison												
Difference in Rates		**+3.6%**		**+4.8%**		**+3.3%**		**+2.7%**		**+3.7%**		**+3.7%**
% Difference in Rates		**+37.9%**		**+58.9%**		**+54.5%**		**+38.4%**		**+53.6%**		**+33.8%**

"Below-Range Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* (March 2006).
"Presumption Circuits" are the District of Columbia, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.
"Other Circuits" are the First, Second, Third, Ninth, and Eleventh Circuits.
"Difference in Rates" and "% Difference in Rates" calculate the difference, in absolute terms and as a percentage, between the rate of Below-Range Sentences in Presumption Circuits and the rate of Below-Range Sentences in Other Circuits. Calculations based on the percentages shown for Presumption Circuits and Other Circuits may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 26A.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 9/30/2006		% Change Post-Booker
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**		
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%	**42.7%**
Above-Range Sentences	306	0.6%	457	0.8%	541	0.8%	382	0.8%	1,686	0.7%	1,816	1.6%	**114.1%**
Out-of-Guidelines Sentences	6,433	11.7%	6,511	11.1%	5,437	8.3%	2,880	6.0%	21,261	9.4%	15,875	13.9%	**+48.4%**
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**812**		
Out-of-Guidelines Sentences	23	8.8%	26	6.3%	22	4.6%	24	5.9%	95	6.1%	131	16.1%	**+164.4%**
First Circuit	**1,430**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**		
Out-of-Guidelines Sentences	151	10.2%	168	9.3%	156	8.5%	77	6.0%	552	8.6%	474	18.5%	**+114.1%**
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**7,301**		
Out-of-Guidelines Sentences	698	17.8%	716	17.6%	786	16.5%	494	14.4%	2,694	16.6%	1,851	25.4%	**+52.4%**
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**5,128**		
Out-of-Guidelines Sentences	213	8.3%	219	8.2%	231	8.3%	128	6.1%	791	7.8%	924	18.0%	**+129.8%**
Fourth Circuit	**4,739**		**5,038**		**5,898**		**4,185**		**19,860**		**10,333**		
Out-of-Guidelines Sentences	269	5.7%	230	4.6%	248	4.4%	170	4.1%	917	4.7%	1,287	12.5%	**+167.0%**
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,506**		
Out-of-Guidelines Sentences	1,622	14.5%	1,475	12.1%	1,121	8.4%	436	4.5%	4,654	10.0%	2,405	9.4%	**-5.8%**
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**		
Out-of-Guidelines Sentences	280	6.7%	275	6.2%	277	5.8%	191	5.6%	1,023	6.1%	1,371	16.1%	**+164.9%**
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**		
Out-of-Guidelines Sentences	162	6.8%	201	7.5%	166	5.5%	110	4.9%	639	6.2%	798	15.9%	**+157.7%**
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**8,214**		
Out-of-Guidelines Sentences	342	9.8%	376	10.5%	356	8.2%	196	5.6%	1,270	8.5%	1,298	15.8%	**+85.5%**
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**20,658**		
Out-of-Guidelines Sentences	1,996	16.8%	2,101	17.9%	1,463	11.0%	668	7.1%	6,228	13.5%	2,906	14.1%	**+4.8%**
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**9,548**		
Out-of-Guidelines Sentences	250	8.4%	308	8.0%	271	6.1%	190	5.1%	1,019	6.8%	1,125	11.8%	**+73.6%**
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**		
Out-of-Guidelines Sentences	427	7.1%	416	6.7%	340	5.3%	196	4.1%	1,379	5.9%	1,303	12.2%	**+106.2%**
Proportionality Circuits	**36,449**		**39,807**		**43,862**		**32,953**		**153,071**		**80,419**		
Out-of-Guidelines Sentences	3,503	9.6%	3,449	8.7%	2,935	6.7%	1,566	4.8%	11,453	7.5%	10,061	12.5%	**+67.2%**
Other Circuits	**18,640**		**18,877**		**21,309**		**15,298**		**74,124**		**33,899**		
Out-of-Guidelines Sentences	2,930	15.7%	3,062	16.2%	2,502	11.7%	1,314	8.6%	9,808	13.2%	5,814	17.2%	**+29.6%**

"Out-of-Guidelines Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* (March 2006).

"Proportionality Circuits" are the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

"Other Circuits" are the District of Columbia, Second, Third, and Ninth Circuits.

"% Change Post-Booker" calculates the percent change, from the Total Pre-Booker to Post-Booker periods, in the rate of Out-of-Guidelines Sentences. Calculations based on the percentages shown for Total Pre-Booker and Post-Booker may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 26A.

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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

The presumption of reasonableness is a legal fiction. It is based not on the objective language of the Sentencing Reform Act ("SRA"), but on a subjective preference for a determinate sentencing regime and mandatory Sentencing Guidelines. Crafted from whole cloth, the presumption is supported only by vague references to an ambiguous legislative history and repeated allusions to the "expertise" of the United States Sentencing Commission ("USSC"). These considerations cannot justify reaching beyond the text of the statute, particularly when application of the presumption raises serious constitutional concerns in all cases and so plainly results in an unreasonable sentence in this one.

I. THE PRESUMPTION OF REASONABLENESS IS INDEFENSIBLE UNDER 18 U.S.C. § 3553 AND *BOOKER*.

1. There is no statutory basis to accord a presumption of reasonableness to within-Guidelines sentences. See Pet. Br. 9-15, 26-28. The government acknowledges that the SRA requires the district court to consider *all* of the sentencing factors delineated in § 3553(a) and to impose a sentence "'sufficient but not greater than necessary'" to satisfy the purposes of sentencing set forth in § 3553(a)(2). Gov. Br. 4, 42. But it ignores almost completely the central issue in this case: there is *nothing* in the text of § 3553(a) that authorizes giving presumptive weight to the Guidelines range. The government devotes a mere two pages to analyzing the text of the statute, see *id.* at 21-22, which is plain and therefore dispositive, see *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992).

Within § 3553(a), the Guidelines are simply the *fourth* of *seven* enumerated factors. See § 3553(a); Pet. Br. 10. If Congress had wanted to give them presumptive weight, it

could have done so, whether before *Booker* or after.[1] But it has not.

In response, the government asserts that "the fact that Section 3553(a) refers to the Guidelines ... only underscores the reasonableness of using the Guidelines as a reference point." Gov. Br. 22. To the contrary, this only underscores the necessity of treating the recommended range as merely one of the multiple factors. The statutory language clearly contemplates that the Guidelines should be viewed as a single factor, of no greater weight than others. *United States* v. *Booker*, 543 U.S. 220, 304-05 (2005) (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors ...."). The *only* textual "reference point" in the statute is the command to consider the relevant factors and impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing. § 3553(a); see Pet. Br. 12-15.

Similarly unavailing is the government's insistence that the Guidelines "reflect the considered judgment of an expert agency, Congress, and sentencing judges across the country." Gov. Br. 22-24. This argument is, at its heart, a misplaced call for deference to the USSC. Deference is due to an agency's interpretation of a statute only when the text of the statute is ambiguous. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Here, the statute is unambiguous. Any call for deference is thus unwarranted.

It is no answer that, notwithstanding the plain text, the Guidelines deserve presumptive weight because they "integrate the congressional sentencing objectives in Section 3553(a)." Gov. Br. 16, 22. Section 3553(a) entrusts the duty of weighing the statutory purposes not to the USSC, but

[1] *See* Brief of *Amici Curiae* United States Senators at 17-18, *Claiborne* v. *United States*, No. 06-5618 ("Senators Br."). Congress knows full well how to enact a statutory presumption when it wishes to do so. *See, e.g.*, 29 U.S.C. § 482(a); 35 U.S.C. § 282; 44 U.S.C. § 1507.

to the sentencing judge. Whether or not the USSC successfully "integrate[d] congressional sentencing objectives" in developing the Guidelines is immaterial to the district court's obligations as set forth in § 3553(a)(2). The statute mandates that the judge exercise his or her own judgment in balancing the relevant factors and purposes based on the facts of the individual case. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996). "[T]he Commission's view of what is 'better' is no longer authoritative, and district judges are free to disagree – as are appellate judges." *Booker*, 543 U.S. at 305-06 & n.4 (Scalia, J., dissenting in part).

And, even if it were true that the USSC merited deference, it is simply not the case that the Guidelines successfully "reflect the relevant Section 3553(a) factors." Gov. Br. 22. The briefs filed in this case have amply demonstrated the numerous reasons why this is not so. See, *e.g.*, Pet. Br. 12-15; Br. of Marc Miller et al., 12-22; NACDL Br. 12-20. To similar effect, myriad accounts document the flaws in the empirical analyses undertaken by the USSC. See generally Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentences After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 Champion 32 (2006); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001). Far from exercising "considered judgment" in characterizing and categorizing offender characteristics, the USSC's methodology was underdeveloped and intentionally "provisional." See Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 182 (1999).[2] And, even if the USSC's empirical methodology was perfect, the past sentences that the Commission examined in develop-

[2] "Even for those categories of cases in which the Commission did indeed seek to replicate past sentencing averages, the Commission's data was limited, and possibly compromised, in several fundamental respects." Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 60-61 (1998).

ing the Guidelines were not guided by the directives of the SRA and did not purport to comply with § 3553(a). The Guidelines thus do not and could not reflect an appropriate balancing of the statutory purposes of sentencing.[3]

2. The legislative history of the SRA in no way demonstrates that Congress understood "that substantial weight [would] be given to the Guidelines" even before it added the now-invalidated provision of § 3553(b) mandating adherence thereto. Gov. Br. 28. In fact, and putting to one side this Court's repeated admonition against "resort[ing] to legislative [intent] to cloud a statutory text that is clear," *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994), the history of the SRA strongly suggests that Congress did not intend subsection (a) to embody a presumption of reasonableness. The SRA's sponsor, Senator Kennedy, acknowledged that the original bill – without subsection (b) – would make the Guidelines range only one of several considerations relevant to sentencing. Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 41 (1998). To be sure, he and others contemplated that the Guidelines would have an impact on sentencing decisions, by informing judges of typical punishments, but this is a far cry from according

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[3] Contrary to the government's claim, Gov. Br. 19, statements of the original USSC, former Commissioners, and current Commission staff demonstrate widespread recognition that the USSC did not address the purposes of sentencing. *See* USSG, ch.1, pt. A(3) (USSC could not "reconcile the differing perceptions of the purposes of criminal punishment"); Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18046, 18121 (May 13, 1987) ("Of all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines."); Breyer, *supra*, at 182 (USSC could not agree on sentencing purposes or what their effect should be); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences*, 38 Ariz. St. L.J. 425, 465 (2006) (noting "Commission's failure to articulate a philosophy for federal sentencing").

them presumptive weight.[4] To the contrary, if legislators believed the Guidelines to be presumptive on the basis of subsection (a) alone, it would have been largely unnecessary for them to insert subsection (b) into the bill, which they viewed as setting forth "the basic presumptive aspects of the [G]uidelines." 124 Cong. Rec. 209, 383 (1978) (statement of Sen. Kennedy); see also Senators Br. 9-11 (discussing evolution of bill from advisory to presumptive).

Nor does the legislative history demonstrate, as the government claims, the insignificance of the parsimony provision of § 3553(a). Gov. Br. 27-28. Language instructing district courts to tailor their sentences based on the four traditional purposes of punishment had been present in the original bill introduced by Senator Kennedy, see Stith & Cabranes, *supra*, at 41 (citing S. 1437, 95th Cong. (1977)), and the parsimony principle formed the centerpiece of an alternative bill reported by members of the House of Representatives, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 271-72 (1993) (citing H.R. 6012, 98th Cong. (1984)). The phrase "sufficient but not greater than necessary" was added to the Senate bill not as an afterthought, as the government suggests, but as a deliberate means to incorporate the principle of parsimony contained in

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[4] In this regard, the government misreads several statements in the legislative history. *See* Gov. Br. 29. For example, the remark that the judiciary committee "'expect[s]'" that "'most sentences will fall within the range recommended in the sentencing guidelines,'" *id.* (quoting S. Rep. No. 95-605, at 1056 (1977)), was nothing more than an empirical prediction about where sentences would fall, not a prescription for where they *should* fall. The committee's statement that "'[t]he need for consistency in sentences ... [should] dissuade a judge from deviating from a clearly applicable guidelines range simply because it would have promulgated a different range,'" *id.* (quoting S. Rep. No. 95-605, at 892-93), did not even relate to § 3553(a). Rather, it reflected the committee's understanding that the statement-of-reasons requirement for a non-Guidelines sentence (now codified in subsection (c)(2)) would not be satisfied by a general expression of overall disagreement with the Guidelines.

the House legislation and to ensure fairness in sentencing. *Id.* Nothing in the history of the SRA suggests that legislators viewed the parsimony provision as less "fundamental" than other aspects of the bill, or expected that it would be trumped by an extra-statutory presumption of reasonableness.

3. The lion's share of the government's argument amounts to little more than a policy-based plea that affording the Guidelines presumptive weight would be salutary.[5] Specifically, the government insists that a presumption is warranted for within-Guidelines sentences to further the policy goal of increased uniformity in sentencing. Gov. Br. 24. However, the objective of the SRA was not to achieve blind uniformity through compliance with the Guidelines. It was, rather, to achieve the linked goals of "avoiding *unwarranted* sentencing disparities ... while maintaining sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991(b)(1)(B) (emphasis added). Even before *Booker* mandated that sentencing judges exercise discretion to sentence throughout the statutory range to comply with the Sixth Amendment, Congress recognized that the individualized exercise of discretion was essential to achieving the objectives of the SRA.[6] Senators Br. 10-

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[5] Taking sides on such policy debates is, of course, the province of the legislature, not the judiciary. *Alabama* v. *Bozeman*, 533 U.S. 146, 156 (2001). Notably, the *amici curiae* brief filed by the Senators in *Claiborne* v. *United States*, No. 06-5618, did not request this Court to endorse a presumption of reasonableness. Senators Br. 19-20.

[6] Directly contrary to this statutory mandate, the USSC has repeatedly revised the Guidelines in order to discourage the exercise of discretion by district judges, by prohibiting and restricting consideration of individual characteristics, *see* USSG, ch.5, and by overruling sentencing decisions based on individual factors not included in the Guidelines. *See, e.g.*, Br. *Amici Curiae* National Veterans Legal Services Program et al., 10-12 (noting that the USSC promulgated USSG § 5H1.11, prohibiting consideration of military service, overruling *United States* v. *Pipich*, 688 F. Supp. 191 (D. Md. 1988), with "no explanation"); USSG, amend. 466 (effective Nov. 1, 1992) (promulgating § 5H1.12, and overruling *United States* v. *Floyd*, 945 F.2d 1096, 1100-01 (9th Cir. 1991), *overruled on other grounds*, *United States* v. *Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en

11; see also S. Rep. No. 98-225, at 52-53 (1983) ("[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case. The purpose of the ... Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."). Thus, to the extent that disparities in sentencing may sometimes result from full and reasoned application of § 3553(a), they are not "unwarranted" disparities at all. Rather, they reflect the proper functioning of the SRA, and therefore do not justify a presumption of reasonableness.

What is more, the claim that the Guidelines serve the SRA's policy of uniformity is fundamentally flawed. As the opening brief demonstrates, the Guidelines themselves contribute to unwarranted sentencing disparities. See Pet. Br. 35-38. For instance, the USSC acknowledges that the relevant conduct rules give rise to "significant sentencing disparities" and that "questions remain about how consistently they can be applied." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 27, 50 (2004); see also Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (1997). Indeed, the government admits that disparities in sentencing "may result from differences in charging and plea bargaining practices," Gov. Br. 31, and the USSC recognizes "limits" to the extent that the Guidelines reduce such government-produced disparities, USSC Br. 30. Simply put, the SRA does not support uniformity above all else, and, to the extent it was meant to foster uniformity, the Guidelines are hardly the means to

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banc), which had permitted downward departures from the Guidelines due to lack of guidance as a youth). That the USSC overwhelmingly favors a mandatory system of determinate sentencing was and remains clear. *See, e.g.*, USSC Br. 5-6.

achieve that goal. According sentencing judges full discretion to impose non-Guidelines sentences is necessary to achieve the true uniformity objectives of the SRA.[7]

4. A presumption of reasonableness is also inconsistent with *Booker*'s requirement that reasonableness review apply "across the board." 543 U.S. at 263. That the remedial majority believed appellate review "would tend to iron out sentencing differences," *id.*, does not, despite the government's urgings to the contrary, Gov. Br. 14, endorse a presumption of reasonableness.[8] "If the majority thought otherwise – if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed – its opinion would surely say so." *Booker*, 543 U.S. at 305-06 (Scalia, J., dissenting in part); see also Pet. Br. 26.

The government purports to recognize that *Booker* establishes the same standard of reasonableness review for *all* sentences. Yet, it later argues that Mr. Rita has failed to "rebut" the presumption. Gov. Br. 14-15, 49. In so doing, the government implicitly acknowledges that a different standard applies to his sentence than to those outside of the Guidelines range. It cannot be claimed that reasonableness review applies equally "across the board," as *Booker* requires, 543 U.S.

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[7] *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003) ("Treating two offenders the same because the rules say so, even though they differ markedly in their culpability, in the harm caused by their crime, or in their risk of recidivism, is to elevate the rules above reason. ... Far from creating disparity, departure in these circumstances avoids true disparity." (footnote omitted)).

[8] The government also cites, at length, a passage from *Booker* noting the continued existence of the USSC, its obligation to collect information from the district courts, and its responsibility to revise the Guidelines accordingly. Gov. Br. 13-14 (citing 543 U.S. at 264-65). However, the government fails to address – much less rebut – petitioner's argument that "sentencing data will be relevant and useful for revision of the Guidelines only if the touchstone of reasonableness review ... is something other than the Guidelines themselves." Pet. Br. 43.

at 263, when the presumption demands different treatment for sentences within and without the recommended range.

The government also attempts to downplay the impact of the presumption, by arguing that it "merely recognizes that when the Sentencing Commission and the individual district court reach essentially the same conclusion, the resulting within-Guidelines sentence ordinarily satisfies that standard." Gov. Br. 14-15. This argument misapprehends the effect of the presumption of reasonableness by ignoring the effect of appellate review on district court decisionmaking. When a court of appeals adopts the presumption, it effectively announces that a sentence falling within the Guidelines range will satisfy the factors and purposes of § 3553(a). *E.g.*, *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), *cert. denied*, 126 S. Ct. 2309 (2006); see also NYCDL Br. 5 (demonstrating that within-Guidelines sentence are almost never reversed). When a district court issues a within-Guidelines sentence in the shadow of this rule, it does not mean that the court has exercised independent judgment in weighing the statutory factors or has concluded that the Guidelines represent the proper balance of those considerations. Rather, it merely reflects the district court's good faith attempt to comply, often despite deep misgivings, FPCD Br. 9-11, with the appellate court's mandate.[9] The supposed "alignment" between the final sentence and the Guidelines range is not a justification for the presumption of reasonableness but rather a direct – and improper – result of it.

That this has occurred and will occur is not open to serious dispute. Simply put, the presumption of reasonableness has bite. Indeed, it would be passing strange for the government to devote such energy to defending the presumption if it were as ineffectual and unnecessary as the government now claims.

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[9] Nor does it reflect, as the government implies, that district courts are "'ignor[ing] their oath.'" Gov. Br. 36. District courts in these circuits are simply attempting to honor their oath to follow the law of their own circuits. Pet. Br. 30 & n.17.

Gov. Br. 16, 38-39. Although the government contends that sentencing practices have remained stable in all circuits since *Booker* was decided, *id.* at 39, the very data upon which they rely show a trend in each presumption circuit of fewer below-Guidelines sentences imposed after adoption of the presumption than before. See USSC Br. 5a-9a, 11a, 13a. Moreover, there is a significant gap in the rate of below-Guidelines sentences in presumption and non-presumption circuits, which widens over time from 14.3% in February 2006 to 34.2% in November 2006. See FPCD Br. A1-4. As the USSC itself recognizes, such a "significant and widening gap between the rate of below-Guidelines sentences" in presumption and non-presumption circuits supports the contention that a presumption of reasonableness renders the Guidelines effectively mandatory. USSC Br. 16.[10]

II. THE PRESUMPTION OF REASONABLENESS IS CONSTITUTIONALLY SUSPECT.

The statutory language, legislative history, and this Court's decision in *Booker* all support petitioner's reading of § 3553(a). But, even if the statute were ambiguous (which it is not), this Court should avoid the government's interpretation because reading the SRA to accord a presumption of reasonableness for within-Guidelines sentences would raise grave constitutional concerns. See *Jones* v. *United States*, 526 U.S. 227, 239-40 (1999).

This Court recently reaffirmed, in *Cunningham* v. *California*, No. 05-6551, 2007 WL 135687 (U.S. Jan. 22, 2007), the "bright-line" rule that it has consistently applied since *Apprendi*: "'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at *7 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). The

[10] Notably, the data upon which the government relies in its brief is, at least in part, not available to the public. The Commission is required to "publish" the data it collects on sentencing. *See* 28 U.S.C. § 995(a)(14).

right to a jury trial, embodied in the Sixth Amendment, guarantees that a defendant will suffer no greater punishment upon conviction than that which is authorized under governing law based solely on the facts found by a jury. *Id.* at *4. In other words, the maximum sentence that a judge may constitutionally impose is that permitted exclusively by the jury's verdict or the defendant's admissions. *Id.* A judge cannot rely on his or her own findings to justify a higher sentence. *Id.*

In all of the cases following *Apprendi*, from *Blakely* through *Booker* to *Cunningham*, the Court disapproved of sentencing systems that permitted a judge to make these types of findings. In *Blakely*, state law required a judge to sentence within a given range, as determined by the facts reflected in the verdict or plea, unless the judge found "'substantial and compelling reasons'" justifying an increased sentence. *Blakely* v. *Washington*, 542 U.S. 296, 299-300 (2004). In *Booker*, the mandatory Guidelines prohibited the judge from imposing a sentence above the "base range," determined by the facts found by the jury or admitted by the defendant, absent factual findings warranting an enhancement or departure. 543 U.S. at 227, 233-34. In *Cunningham*, state law directed the judge to impose a presumptive "middle term" sentence, established by reference to the verdict or plea, unless the judge found "circumstances in aggravation" warranting a sentence of the "upper term." 2007 WL 135687, at *7, *11; see also *id.* at *21 (Alito, J., dissenting). All of these systems were found to be constitutionally suspect because they established a maximum lawful sentence based on the facts submitted to the jury or admitted by the defendant, and then allowed the judge to impose a sentence above that range based on his or her own supplemental findings of fact. See *id.* at *8-14.

The presumption of reasonableness operates similarly. It holds that a sentence within the Guidelines range will be presumed reasonable (and hence lawful) without the need for further explanation or additional findings. *E.g.*, *Green*, 436

F.3d at 457. Sentences above the Guidelines range, however, must be supported by particular circumstances identified by the district judge. *E.g.*, *United States* v. *Cage*, 451 F.3d 585, 594-95 (10th Cir. 2006) ("[W]here ... a district court effectively ignores the advice of the Guidelines[,] ... we should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range."). In other words, a sentence above the Guidelines range may be imposed only if the judge expressly finds additional circumstances – not found by the jury – warranting the variance.

Courts applying the presumption of reasonableness effectively mandate, through their interpretation of § 3553(a), that district courts impose a sentence within the range recommended by the Guidelines absent additional facts justifying a variance. See *id.* Indeed, some courts now hold that the burden to find these additional facts, beyond those found by the jury, increases as the judge departs further from the Guidelines sentence. This "proportionality principle" logically follows if the Guidelines are the touchstone of reasonableness, and courts have recognized that the facts found by the judge must become more "extraordinary" as the variance from the Guidelines grows. *E.g.*, *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006). The government concedes that "proportionality review asks for an *especially strong justification* for a sentence that varies widely from the advisory Guidelines range." Gov. Br. 34, *Claiborne* v. *United States*, No. 06-5618 (emphasis added).

The circumstances necessary to justify a variance must be understood, as they were in *Cunningham*, to involve additional findings of fact. See 2007 WL 135687, at *6-7, *14. Indeed, courts of appeals applying the presumption have held that a district court may not vary from the Guidelines based solely on policy disagreements with the Guidelines or Congress, and they have required district courts to offer reasons

for the variance beyond those reflected in the verdict or plea. See *United States* v. *Eura*, 440 F.3d 625, 633-34 (4th Cir. 2006); *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Imposing a variant sentence necessarily involves additional, judicial findings of fact. These facts have the effect of increasing the maximum punishment to which the defendant would otherwise be exposed under governing law. And since they are to be found by the judge, not the jury, the Sixth Amendment is implicated.

The Court recognized in *Cunningham* that a sentencing system in which "judges are not free to exercise their 'discretion to select a specific sentence within a defined range'" raises constitutional concerns. 2007 WL 135687, at *14 (quoting *Booker*, 543 U.S. at 233). In the government's proposed world, where the presumption of reasonableness governs, the sentencing judge is not "free" to exercise discretion to sentence outside of the base Guidelines range, as determined by the facts reflected in the verdict or plea, without making additional findings justifying an enhancement under the Guidelines or a variance from that range.[11] This Court's decisions raise grave constitutional doubts about such a system. See *Booker*, 543 U.S. at 233.

"*Booker*'s remedy for the Federal Guidelines ... is not a recipe for rendering [this Court's] Sixth Amendment caselaw toothless." *Id.* Yet that is precisely what the presumption of reasonableness does. It turns the fundamental and substantive principle of the *Booker* constitutional majority into a game of clever wordplay. Congress, *Booker* taught, may not raise the cap on the lawful sentencing range based on findings made by

[11] That the district judge has discretion to decide upon the nature of the additional facts that may justify a variance should not be understood as discretion to grant a variance in the absence of any additional facts. *Blakely*, *Booker* and *Cunningham* recognize that only discretion in the latter sense comports with the Sixth Amendment. *See, e.g.*, *Cunningham*, 2007 WL 135687, at *12. District courts operating under the presumption of reasonableness enjoy discretion to determine the facts that justify a variance, but not to grant a variance absent additional findings of fact.

judges, instead of juries. But, the government argues, if the "mandate" is changed into a "presumption of reasonableness," it is constitutionally permissible, even though the effect is precisely the same: a sentencing judge still must find additional facts to alter the lawful sentencing range.[12] Whether this backdoor effort to undermine the constitutional majority in *Booker* is itself constitutional need not be decided in this case. The government's position is constitutionally suspect and should be rejected, all the more so because it is based on an interpretation that is directly contrary to the text of § 3553(a). *Supra* at 1-4.

III. THE SENTENCE IMPOSED IN THIS CASE IS UNREASONABLE, WHETHER OR NOT THE PRESUMPTION OF REASONABLENESS APPLIES.

The government asserts that, despite the lack of an adequate explanation for the sentence, the judgment of the district court should be deemed reasonable because (1) the district court was not required to provide a statement of reasons for the sentence, (2) the record as a whole reflects adequate consideration of the relevant sentencing factors, and (3) the mitigating evidence presented by Mr. Rita was insufficient to rebut the presumption of reasonableness accorded to the sentence. Gov. Br. 41, 45-46, 49-50. Each argument fails.

1. Section 3553(c) gives an unambiguous command: "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence ...." § 3553(c). The government agrees that this provision applies to any sentence, regardless of where it falls in the statutory

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[12] The similarity to the invalidated mandatory Guidelines system becomes even clearer in light of the government's position that a sentencing judge need offer no reasoned explanation at all when sentencing within the Guidelines range. *See infra* at 15. According to the Government, even after *Booker*, a sentence by a judge who treats the Guidelines as if they were commands to be followed, rather than advice for the exercise of discretion, is all but immune from reversal.

range or whether it is presumed reasonable. Gov. Br. 39-40. The government nevertheless argues that, when a sentence falls within the Guidelines range, the district court need not provide a statement of reasons in support of judgment. "[I]n the absence of contrary indications in the record," the government asserts, "a court of appeals may presume that the district court understood its obligations and adequately considered the Section 3553(a) factors, since '[t]rial judges are presumed to know the law and to apply it in making their decisions.'" *Id.* at 41 (alteration in original) (quoting *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990)).

This argument not only conflicts directly with the statutory text; it advocates a wholesale abnegation of appellate review. In the government's view, a judgment should be affirmed, notwithstanding the lack of any indication of a reasoned exercise of discretion, so long as the record does not include affirmative evidence of error. Contrary to the commands of § 3553, a district court would not need to describe its rationale for a sentence or its consideration of the statutory factors. Indeed, it would be provided with a strong, perverse reason not to explain itself: to do so is to create a risk of reversal that would not otherwise be present, since an extensive record will serve only as a basis for vacating the judgment. The less said by the district court, in the government's view, the better.

This fundamentally misapprehends the nature and necessity of appellate review. Appellate courts can certainly presume in many instances that a district court recognized the statutes and rules governing a particular issue and attempted to apply them in rendering judgment. *Walton*, 497 U.S. at 653-54, *overruled on other grounds*, *Ring* v. *Arizona*, 536 U.S. 584 (2002). But, even if courts of appeals can assume that the appropriate standard was applied, they cannot assume that the standard was applied *correctly*. It is inevitable that district courts, despite their best efforts, will sometimes commit legal or factual error. Only if the district court provides an explanation of its judgment can the courts of appeals exercise the

meaningful oversight necessary to address these issues. See *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) ("[W]e will not infer a reasoned exercise of discretion from a record that ... is silent.").

This Court has so held. In *United States* v. *Taylor*, 487 U.S. 326 (1988), the Court concluded that, "[when] Congress has declared that a decision will be governed by consideration of particular factors, a district court must ... *clearly articulate their effect* in order to permit meaningful appellate review." *Id.* at 336-37 (emphasis added). If the district court has not explained its judgment, demonstrating rational assessment of the statutory factors, its decision must be reversed. See *id.* at 326-27.

The government argues that the rule of *Taylor*, derived from a phrase of the Speedy Trial Act identical to one in the Sentencing Reform Act, compare 18 U.S.C. § 3162(a) ("shall consider"), with § 3553(a) ("shall consider"), cannot be applied in the sentencing context. It cites nothing in the language or legislative history of the Acts to support this conclusion. Rather, it merely asserts once again that the Guidelines already "'take[] into account'" all of the factors of § 3553(a). Gov. Br. 42. This is incorrect both as a matter of fact, see *supra* at 2-4, and as a matter of statutory interpretation, see *Northcross* v. *Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language ... is, of course, a strong indication that the two statutes should be interpreted *pari passu*."). Most importantly, it contravenes the express directive of § 3553(c), which explicitly demands – in accordance with the holding of *Taylor* – a statement of reasons for the judgment. § 3553(c).

The government's sole argument related to the text of the statute is that, because § 3553(c)(2) requires a district court to provide the "specific" reason for imposition of a non-Guidelines sentence, § 3553(c) must be read to require only a "general" reason for imposition of a Guidelines sentence. Gov. Br. 39-40. This misses the mark.

The statements contemplated by subsections (c) and (c)(2) serve qualitatively different purposes. Subsection (c) requires that the district court provide, in accordance with *Taylor*, the "reason for its imposition of the particular sentence" in light of the relevant factors and purposes of § 3553(a). § 3553(c). Subsection (c)(2), in contrast, requires that the district court provide the "specific reason for the imposition of a sentence *different from that described [in the Guidelines]*." *Id.* § 3553(c)(2) (emphasis added). So, whereas subsection (c) focuses on the district court's balancing of considerations under § 3553(a), subsection (c)(2) homes in on the deficiencies of the Guidelines in the particular case at issue. It does so because the latter information has a special purpose: it is meant to be (although often is not) used by the USSC to revise the Guidelines. See 28 U.S.C. § 994(o), (w); see also S. Rep. No. 98-225, at 79 ("This requirement would essentially explain why the court felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand."). There is no inherent overlap between the statements required under subsections (c) and (c)(2) and therefore no reason to limit the scope of the former provision.

The government ably burns a straw man when it asserts that the district court need not "address *every* argument for a sentence higher or lower than the one imposed." Gov. Br. 42 (emphasis added). No one has claimed otherwise. Section 3553(c) requires only that the judge offer an affirmative explanation, indicating to the degree possible why the final sentence was imposed in light of the relevant factors and purposes. See, *e.g.*, *United States* v. *Johnson*, 467 F.3d 559, 563, 566 (6th Cir. 2006); *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1116-18 (10th Cir. 2006). There is no need, for instance, for the judge specifically to reject each incrementally lower or higher sentence or address obviously irrelevant issues. *Accord Taylor*, 487 U.S. at 336-37.

2. The government does not argue that the district court in this case offered a thorough statement of reasons when im-

posing sentence. See Gov. Br. 45-49. Rather, it contends that the record "as a whole," and particularly the district court's admission of evidence relating to Mr. Rita's severe health problems and exemplary military service, reflects consideration of the relevant factors and satisfies the statutory obligation to state the reasons for the sentence. *Id.* at 44, 45-49. This is plainly incorrect.

Compliance with § 3553(c) and *Taylor* requires that the district court do more than simply accept relevant evidence into the record. The SRA mandates not only that the district court "receive" information concerning the appropriate sentence, 18 U.S.C. § 3661, but that it "consider" that information and then "state ... the reasons" for imposing a particular sentence in light thereof, § 3553(a), (c). That a district court accepts evidence relating to the statutory factors and purposes into the record does not satisfy the statutory requirement, and provides no basis for a court of appeals to determine that the district court has applied that information in a reasonable manner in crafting the final sentence. Cf. *United States* v. *Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) (vacating sentence when district court offered a list of the defendant's relevant characteristics but did not explain how they impacted the final sentence).

The government concedes that "[t]he court's statement of reasons surely could have been lengthier, or more detailed." Gov. Br. 48. To be sure. In fact, the statement *was required to be* more detailed. Mr. Rita introduced substantial information concerning his physical condition and military service. These considerations, as the government acknowledges, constituted mitigating circumstances relating directly to the factors and purposes of § 3553(a). *Id.* at 48-49. Even if these facts were undisputed, the district court was obliged under § 3553(c) and *Taylor* to explain how it applied the information to arrive at the final sentence. Its failure to do so renders the sentence unreasonable, whether or not a presumption of reasonableness applies.

3. The government finally argues that, assuming the district court's explanation was adequate and the presumption of reasonableness applies, the sentence may be affirmed as reasonable because the district court understood its statutory obligations and fully considered the relevant factors and purposes. *Id.* at 45-50. This is, again, incorrect. The record below affirmatively demonstrates that the district court misunderstood and misapplied the standards governing the imposition of sentence under § 3553(a).

Most notably, the district court assumed that it was somehow bound by the Guidelines range, despite its apparent recognition that the Guidelines had been rendered advisory by *Booker*. In imposing sentence, the district court stated that it was "unable to find that the sentencing guideline range ... is an inappropriate guideline range." J.A. 87. This statement strongly suggests that the district court viewed the Guidelines range as presumptively correct, and effectively binding in the absence of additional facts supporting a variance. This constitutes plain legal error, and renders the sentence unreasonable whether or not a presumption of reasonableness is applied on appeal.

The government counters that, because the sentence was at "the bottom of the advisory Guidelines range," Mr. Rita cannot establish that his sentence was unreasonable. Gov. Br. 44-45. Quite the opposite is true. The fact that Mr. Rita was sentenced at the bottom of the range, when considered with the district court's comments regarding the lack of evidence to support a variance, suggests that the district court viewed the Guidelines as establishing a presumptive limit on its discretion, which could not be overcome absent a substantial justification. In other words, the judge apparently believed that he could approach the edge of the Guidelines range, but that something more would be necessary to step over it. See *Cunningham*, 2007 WL 135687, at *10 (recognizing that such a system violates *Booker*).

Had the district court in this case exercised its discretion to sentence throughout the entire statutory range, it more than likely would have imposed a sentence below the 33-month term of imprisonment recommended by the Guidelines.[13] Mr. Rita devoted 25 years to serving his country in the military, completing tours of duty in the Vietnam and Gulf Wars and earning over 35 awards and medals. He now suffers from a litany of serious medical ailments, including exposure to Agent Orange, many of which can be treated more effectively outside of a prison environment. Pet. Br. 3-4, 18-23. The government concedes that these facts – which are not addressed in the Guidelines calculation – are undisputed and militate in favor of a lesser sentence. Gov. Br. 48-49. A term of imprisonment – much less one of almost three years – was wholly unnecessary to serve the purposes of deterrence, incapacitation, or rehabilitation, see § 3553(a)(2)(B)-(D), and it was similarly unwarranted to advance any interest in retribution, see § 3553(a)(2)(A), especially since the district court candidly acknowledged that it could not assess the impact of Mr. Rita's two misstatements to the grand jury or the "seriousness" of the third-party investigation that precipitated the charges against him. J.A. 86-87. These circumstances, together with the district court's perception of being cabined by the Guidelines range, rebuts any "presumption of reasonableness" and establishes the unreasonableness of the sentence.

CONCLUSION

The decision of the Fourth Circuit should be reversed, the sentence vacated, and the case remanded to the district court for resentencing.

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[13] Contrary to the government's suggestion, Mr. Rita does not argue that the Guidelines range was improperly calculated. *See* Gov. Br. 47 (discussing Pet. Br. 3, 21-22 & n.11). The "accessory after the fact" enhancement simply illustrates the lack of procedural protections accorded to defendants who are subject to uncharged-conduct enhancements under the Guidelines, and illuminates the multiple grounds on which the district court in this case could have based a lesser sentence.

Respectfully submitted,

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No. 06-5754

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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL VOLUME TO THE JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:04CR105
NOVEMBER 8 & 9, 2004

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VICTOR A. RITA, JR.,
Defendant.

TRANSCRIPT OF TRIAL TESTIMONY AND JURY INSTRUCTIONS BEFORE THE HONORABLE WILLIAM L. OSTEEN UNITED STATES DISTRICT JUDGE

APPEARANCES:

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FOR THE DEFENDANT	DENZIL H. FORRESTER, ESQ. P.O. Box 32511 Charlotte, NC 28232

* * * *

[17] A In April—in late April, after the recall had been initiated, a local resident down in Charleston, close by where my field office is, was interviewed by me after we had

recovered a PPSh-41. And that person relayed a story that he had called Interordnance and they had told him, "Don't give that evidence to ATF. It's not your job to do that." And that was basically the information I was getting from that witness. But we were not able to determine exactly who that witness was talking to or talking about from the company, so we felt Mr. Rita would be able to provide further detail on that, for that aspect of investigation.

Q What was the name of individual you talked to in Charleston who provided you that information?

A His name is David Lawson.

Q Had you talked to David Lawson at the time that a decision was made to call Mr. Rita to the grand jury?

A I spoke with Mr. Lawson prior to that. It was—April 25 is when I interviewed Mr. Lawson.

MR. MARTENS: Your Honor, at this time I'd like to pass out the transcripts to the jury that we previously discussed.

THE COURT: Is that No. 11 you're talking about or is that—

MR. MARTENS: We have a stipulation on Government's Exhibit 1 and Government's Exhibit 2, which I'd

* * * *

[28] stipulation as to the admissibility of Government's Exhibit 12. I move to admit Government's Exhibit 12 into evidence.

THE COURT: Any objections? If it's a stipulation, then no objections.

MR. FORRESTER: No objection, Your Honor.

THE COURT: All right. It's admitted.

(Government's Exhibit No. 12 received.)

BY MR. MARTENS

Q Right. Agent Schroepfer, can you see Government's Exhibit 12 on the screen in front of you?

A Yes, sir, I can.

Q Okay. And have you seen this document before?

A Yes, I have.

Q And what is Government's Exhibit 12?

A Government's Exhibit 12 is one of the documents that was surrendered pursuant to the grand jury subpoena, along with the previous exhibit, the actual PPSh-41 parts kit.

Q Do you see at the top of that document where it says "parcel shipping order"? Right at the top of the exhibit. Do you see that?

A Yes, sir.

Q Okay. Do you see underneath that it says "customer"?

A Yes, I can.

Q Can you read for the jury what's written in the box where it says "print name"?

[29] A "Victor A," like alpha, "Rita." R-I-T-A.

Q And do you see—

A There's another mark next to it that I can't make out.

Q Do you also see the box marked "date"?

A Yes, sir.

Q Can you read that date for the jury, please?

A It's dated 9-6-2003.

Q Finally, in the box marked "Package A, sent to," can you read what that box says?

A Box A, marked sent to, it's Interordnance of America, 3305 Westwood Industrial Boulevard, Monroe, North Carolina 28110.

Q Thank you. Sir, one last question. Did you have the opportunity in November of 2003, after Mr. Rita testified in grand jury, to speak with him?

A Yes, sir, I did.

Q And where did that meeting occur?

A. That meeting occurred at the U. S. Attorney's Office here in Charlotte, North Carolina.

Q Who was present for that meeting?

A In addition to myself—

THE COURT: Just a moment. Approach the bench, please.

(Sidebar not reported.)

BY MR. MARTENS

* * * *

[45] Q And what is the length of that call?

A 175 minutes.

Q Two lines up above that, in line 66, do you see another call to that 8280 number?

A Yes, sir, I do.

Q What's the duration of that call?

A 138 minutes.

Q Moving down to line No. 73, do you see a call from number (305) 893-7115?

A Yes, I do.

Q And what number was that call placed to?

A That particular call (355) 360-1557.

Q Do you know (355) 360-1557?

A I don't know. I recognize that number as Special Agent Levin's telephone number.

Q And what was the duration of that call?

A Seven minutes.

Q And that call was at what time?

A 0826.

Q Which is what?

A 8:26 in the morning on 8-4.

Q Directing your attention down to line 78, do you see another call from the 7115 number?

A Yes, sir, I do.

Q And to what number was that call placed?

[46] A That was placed to area code (704) 225-8843.

Q And do you know what (704) 225-8843 is the telephone number for?

A Yes, sir. I recognize that telephone number as belonging to Interordnance of America.

Q And what time did that call to Interordnance occur?

A At 10:05 a.m.

Q Sir, during Mr. Rita's statement to you on November 19th, 2003, was he consistent?

A No, sir.

Q In what ways was he not consistent?

A He was not consistent with explaining why those telephone calls were placed in the manner they were when confronted with his grand jury testimony. We had the transcript, which the jurors now have in front of them, we had that on the table, and we also had the exhibit that was just on the monitor, the call detail records, and we were confronting Mr. Rita about that inconsistency. And he gave various reasons for providing inconsistent statements. However, he did acknowledge that he knew he called Interordnance before turning the kit in, and he knew that that was inaccurate when he provided that to the grand jury.

MR. FORRESTER: Your Honor, I move to strike that answer. Which kit is he referring to?

THE COURT: All right.

* * * *

[56] Q And did you call Mr. Rita or did he call you?

A No. He had to—he called me back.

Q Do you remember when it was that he called you?

A It was a Thursday and I believe it was September 4th of 2003. It was last year.

Q I want to show you on line in front of you what's been admitted as Government's Exhibit 5, and I'll highlight line 73 there. Do you recognize the number (305) 360-1557?

A Yes. That's my cell phone.

Q Is that your work cell phone?

A It's my personal, but it has—I just use that all the time. Plus, it's a Keys number so it would be a local number from the Keys.

Q Directing your attention to the morning of September 4th, 2003, did you receive a telephone call from Mr. Rita?

A Yes, I did.

Q Can you tell the jury about that telephone call.

A Mr. Rita called me and I identified myself by name and that I worked with ATF. I explained to him that the reason why I was contacting him or attempting to contact him was that I needed to recall a gun that he had received from a company in North Carolina called Interordnance, and that it was some type of machine gun parts kit. It was called a PPSh-41.

[57] At that time I asked him if he had this gun and he said yes, he had the gun, and it was in Key West. He also told me he was in Miami at that time.

Q Where were you when this telephone call occurred?

A I was at my house in Miami.

Q How did you know to ask Mr. Rita for the PPSh-41 parts kit?

A Well, I was referring—at that time I had a file, still have it, where I had an invoice that had Mr. Rita's name on it, and that he had ordered a PPSh-41, with a clip or the magazine that goes with it. So I was referring to that document with the time that was ordered on it and shipped.

MR. MARTENS: Your Honor, if I might approach the witness?

THE COURT: Yes, sir.

BY MR. MARTENS

Q I'd like to show you what's been marked as Government's Exhibit 15 and ask you if you recognize this document.

A Yes, I do.

Q What is Government's Exhibit 15?

A This is a copy of an Interordnance invoice where it's billed to Mr. Rita, and it was invoiced on January 9, 2003, for one PPSh-41 Russian parts kit and one PPSh-41, 30-round stick magazine.

[58] Q Is this the invoice you referred to having here?

A Yes. In addition I recognize March 20th, 2003, was the date that we were getting information on doing the recalls.

MR. MARTENS: Your Honor, I move Government's Exhibit 15 into evidence.

THE COURT: Any objection?

MR. FORRESTER: No objection.

THE COURT: Admitted.

(Government's Exhibit No. 15 received.)

BY MR. MARTENS

Q Now, on Government's Exhibit 15, is there a particular type of parts kit referred to on this document?

A Yes. A PPSh-41.

Q Is there any reference on Government's Exhibit 15 to an RPK parts kit?

A No.

Q At any time during your, discussion with Mr. Rita, did you have a discussion about an RPK parts kit?

A No.

Q Did you have any other discussion with Mr. Rita during this telephone call?

A Yes. I generally asked him—I had seen other of these PPSh-41 parts kits, and they were really cut up. And the one that I just had seen a short period of time before I had spoken with him was difficult to put together. So as a

* * * *

[60] that I dealt with were the PPSh-41s. I didn't know anything about the RPK.

Q Had you at that point recovered any of the PPShs from the other three individuals who you had contacted?

A Yes. I had just recovered one—there was one in the Upper Keys, Middle Keys, and the Lower Keys. In the Upper Keys I had just recovered one. In the Middle Keys, it was so bad the individual threw it away. And in the north, I don't remember the disposition, but I had just had a kit before that.

Q What, if any, arrangements were made with Mr. Rita during the telephone call to recover the kit?

A I offered—it was a Thursday, and he indicated that the gun—the kit was in Key West. I offered to drive down and meet him down there and have the kit abandoned to me.

At that time he said he would be going down over the weekend. His son might have the kit. He wasn't sure exactly where it was. So he was going to bring it back to me the following Monday and meet me at the ATF office in Miami.

Q And did that, in fact, occur?

A No.

Q What happened?

A Sometime in the middle of the week I received a call from Mr. Neil Taylor.

[61] Q You said middle, which week are we referring to?

A The following week.

Q After September 4th?

A That's correct.

Q Who is Neil Taylor?

A He was an attorney in the Miami area.

Q And Mr. Taylor contacted you, what happened?

A He informed me that—I believe he said he was a friend of Mr. Rita's, and I was surprised he called. And he said that he was going to be giving me the parts kit that I was asking for.

Q And so did you make arrangements to meet Mr. Taylor to recover the kit?

A Yes, I did.

Q And what were those arrangements?

A The arrangement I would go to his office with the form, the abandonment form, and Mr. Taylor would give me the parts kit and he would sign off on the form for Mr. Rita.

Q Did you set a date to accomplish that surrender of the parts kit?

A Yes, we did, and I believe it was around the 17th of September.

Q Did you, in fact, go to Mr. Taylor's office on the 17th?

A Yes, I did.

[62] Q What happened when you arrived at Mr. Taylor's office on September 17th, 2003?

A Once I went into his office he handed me a small brown—like a cardboard box. And I pulled out the abandonment form to fill it out. And when I opened up the box there was a gun. I didn't know what it was. It wasn't the PPSh-41.

Q How did you know it wasn't the PPSh-41?

A It didn't look like any of the pictures I had, and it didn't look like the PPSh-41 I had just recovered a short time before. I didn't know what it was.

Q When you saw the kit in that box and realized it wasn't a PPSh-41, what happened next?

A I requested that Mr. Taylor call Mr. Rita and ask what this was. I didn't understand why I was getting something different than what I asked for. He refused to. And then he handed me—Mr. Taylor handed me a receipt from a Mailbox-R-Us or some kind of private mailing company out of Key West, Florida.

Q I want to show you what's been previously marked and admitted as Government's Exhibit 12, and ask if you recognize that?

A Yes, I do.

Q What is Government's Exhibit 12?

A This is the receipt that I was handed from the [63] attorney, and it's a parcel shipping order from—it is a Mailbox Etc., from Victor Rita, and it is from the Key West, Mail Boxes-R-Us, and it's addressed to Interordnance. There should be a receipt on the side.

Q Over here on the left-hand side of Government's Exhibit 12, do you recognize that receipt?

A I recognize the receipt. It was with the shipping order. And, again, it's from Mail Boxes Etc., out of the Key West area, and it's dated—it was the 6th. I believe it was September 6th. And I recognized it. It had, in blue ink, a PPSh-41 written on that receipt.

Q Do you know what day of the week September 6th, 2003 was?

A It should be a Saturday.

Q Was that before or after you spoke with Mr. Rita by telephone?

A Two days after I spoke with him.

Q After you received this paperwork from Mr. Taylor, what happened?

A I again asked him to—I asked him—which he couldn't answer, you know, why—where the PPSh one, why it was mailed back to Interordnance. I didn't understand. So to clarify, I wanted to call Mr. Rita from his office and he refused. He did state that he would have talk to—

MR. FORRESTER: Objection, Your Honor.

* * * *

[85] A We met once a month. Usually the last week of the month.

Q And was that every month?

A Yes.

Q And how long did you meet each week?

A It would vary from two days to five days.

Q How much grand jurors were there?

A I believe there was 27, as well as I can remember.

Q What were your obligations as a grand juror, as the foreman, excuse me, of the grand jury?

A I would swear the witnesses in. I would make sure we had a quorum for each session. At the end of the day I would do the returns, the true bills, to the magistrate judge.

Q What's that mean, do the return of the true bills?

A The indictments that we had voted on.

Q During your time as a grand juror here in Charlotte, how many investigations or indictments did you take part in?

A We probably heard close to 400 cases that year.

Q Did you hear witnesses in addition to cases?

A Yes, we did.

Q During the year 2003, were you involved in an investigation of Interordnance?

A Yes, we were. Yes.

Q Can you tell the jury what you remember about the [86] investigation of Interordnance in 2003?

A We were investigating the sales of illegal guns. I believe they were machine guns.

Q And did you hear witnesses concerning that?

A Yes, we did.

Q At some point did a witness—or excuse me, directing your attention to October 27th of 2003, did a Mr. Victor Rita appear before the grand jury?

A Yes.

Q And were you present that day?

A Yes.

Q And do you see Mr. Rita in the courtroom today?

A Yes.

Q Could you describe what he looks like for the jury?

A He's seated at the table to the left, wearing glasses, wearing the dark suit with the red tie.

MR. MARTENS: Your Honor, I'd ask the record reflect that the witness has identified the defendant.

THE COURT: It does.

BY MR. MARTENS

Q When Mr. Rita appeared before the grand jury that day, was he placed under oath?

A Yes, he was.

Q Who placed him under oath?

A I did.

* * * *

[88] A Yes.

Q And what generally, just in a general way, was Mr. Rita questioned about?

A He had purchased two guns from Interordnance.

Q And do you remember generally what he was questioned about with regard to those guns?

A He was asked when he purchased them and if he had returned them to Interordnance.

Q I'd like to show you on the screen in front of you what's already been admitted as Government's Exhibit 2, page 8 of that exhibit, and ask you to take a moment and look at the highlighted testimony.

A Okay.

Q Did you have the opportunity to review this transcript before appearing here as a witness today?

A Yes.

Q And do you recall Mr. Rita being asked the questions reflected on Exhibit 2 and giving the answers in the highlighted area?

A Yes.

Q Did that testimony, as you were there as a grand juror that day, have the potential to influence your decision-making thinking or actions as a grand juror?

A Yes.

Q Can you explain to the jury how that is so?

* * * *

[103] THE COURT: That's how many stipulations there are?

MR. MARTENS: Several pages.

THE WITNESS: Your Honor, may I be released?

THE COURT: Yes, sir, you may go. Thank you, Mr. Marshall.

MR. MARTENS: There's three pages.

THE COURT: All right. Let's get those in.

MR. MARTENS: The parties in the matter of the United States versus Victor A. Rita, Jr., both the defense and the United State hereby stipulate and agree that Interordnance of America advertised Russian EPPSh-41 parts kit for sale. That on or about September 10th, 2003, the defendant, Victor Rita, voluntary delivered an RPK parts kit to his attorney, Neil Taylor, for surrender to ATF. That no letter was sent to Victor Rita by the Bureau of Alcohol, Tobacco, Firearms requesting that he surrender his PPSh parts kit to ATF.

That at the time Mr. Rita was called before the federal grand jury in Charlotte, North Carolina, on or about October 27th, 2003, the federal prosecutor conducting the grand jury investigation was acting under the belief that Mr. Rita had reassembled his PPSh parts kit into a fully functioning condition.

In addition, the prosecutor was aware of a report [104] that Interordnance personnel had, during a telephone call, attempted to discourage David Lawson from cooperating with ATF in its effort to recover the Russian PPSh-41 parts kit that Mr. Lawson had previously purchased from Interordnance.

The parties also agree that Government Exhibit 12 is a true and correct copy of the records of the Saturday, September 6th, 2003, shipment of the PPSh-41 parts kit by Victor Rita to Interordnance of America, via UPS.

The parties further stipulate and agree that if called to testify at trial, the defendant's wife, Isabel Rita, would state

that she has never placed a telephone call to Interordnance of America. And, further, that she did not place a telephone call to Interordnance on or about September 4, 2003.

If called to testify at trial, the defendant's son, Amado Angel Rita, would state that he has never placed a telephone call to Interordnance. And, further, that he did not place a telephone call to Interordnance on or about September 4th, 2003.

And, finally, the telephone number (704) 225-8843 is, in fact, the telephone number for Interordnance of America LP, in Union, North Carolina.

THE COURT: Those stipulations are agreed upon by the parties?

MR. FORRESTER: They are, Your Honor.

275 B

Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals and families whose lives have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation, and the characteristics of the offender. In short, FAMM believes that the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and *sufficient but not greater than necessary* to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

FAMM believes that this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), represented a significant and positive step toward those goals. FAMM is concerned, however, that the federal courts of appeals have too often failed to heed the lessons of *Booker* and in general

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

have, subtly but effectively, reinstated the inflexible Guidelines regime that this Court has rejected.

SUMMARY OF ARGUMENT

I. The core congressional command in 18 U.S.C. § 3553(a) is that district courts must "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has now reasserted itself in light of *Booker*. By excising a conflicting command in 18 U.S.C. § 3553(b)(1) that district courts must hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing process just as seriously as they were required to follow the Guidelines before *Booker*.

II. Section 3553(a) also contains a second mandatory feature: the procedural requirement that district courts "shall consider" a variety of expressly enumerated factors in fashioning sentences. In requiring courts to formulate every sentence by considering a defined set of philosophical principles and a range of specified sentencing-related factors, § 3553(a) reflects the overriding importance of two indispensable elements of just sentencing: reasoned judgment and individual-

ized tailoring. Section 3553(a) directs district judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. District judges must then exercise reasoned discretion to tailor a sentence for the particular person who stands before the court. Section 3553(a), in short, creates a regime in which mechanical calculation is not to be elevated over individualized consideration, and in which bureaucratized punishment is not to supplant human judgment.

Given the principle of parsimony and § 3553(a)'s requirement that district courts individually consider a range of specified sentencing factors, the statute provides no basis for a presumption in favor of a guideline sentence (or, similarly, a requirement that an out-of-guideline sentence be justified by "extraordinary circumstances"). Nothing in the statute's text or structure provides any foundation for concluding that a sentence calculated under § 3553(a)(4), which was preeminent only because of the now-excised portion of § 3553(b)(1), is entitled to special significance for purposes of appellate review. By creating Guidelines-focused presumptions, several circuits have acted at odds with the basic reasoning of the remedial majority opinion in *Booker*, and have impermissibly substituted a differential standard of appellate review for the across-the-board reasonableness standard announced in that opinion.

III. The task of giving content to *Booker*'s "reasonableness" standard for appellate review must be dictated by what the statutory text and structure actually require. The purpose of such review is modest, but significant: to ensure that district courts do not stray unreasonably from their core statutory obligation to impose individualized sentences consistent with the bedrock imperative of parsimony, which take into account the factors specified in § 3553(a). Whether a sentence falls within a guideline range, above it, or below it, the same criteria should be applied in determining whether a sentence is reasonable. Several additional points about the nature of

post-*Booker* appellate review follow from these basic observations.

A. The plain terms of § 3553(a) show that process matters. Meaningful appellate review of sentences imposed under that provision is possible only to the extent that the district court provides a record demonstrating that it has considered all that the statute requires. The more thorough and well-documented the district court's consideration of the statutory factors, the greater the likelihood that the resulting sentence should be upheld as reasonable. This does not mean that a sentence imposed pursuant to correct procedures invariably must be upheld. But it is to say that the primary task of appellate courts should be to ensure that the procedural requirements of § 3553(a) have been satisfied.

B. Once an appellate court is satisfied that a procedurally correct sentence has been imposed, further review of the sentence for reasonableness should be guided by two principles. First, to ensure that a court of appeals retains an ability to remedy a true outlier sentence, while ensuring that the appellate court does not substitute its judgment for the decision of the judge who actually looked the defendant in the eye, the appellate court should be permitted to review the substantive sentencing result only under an *extremely* restrictive standard. Second, because a district court's primary task is to comply with the parsimony requirement in § 3553(a), the reviewing court should always ask itself whether the district judge imposed the least restrictive sanction necessary to achieve the specified purposes of sentencing. If the court of appeals is *not* convinced that the district judge reasonably concluded that he or she imposed the least severe punishment that still would have satisfied the specified purposes of sentencing, then the sentence must be vacated.

If the Court articulates the scope of reasonableness review in such a way, FAMM believes that the federal sentencing process will move closer to embodying the attributes of a fair and humane system of justice: respect for the law as written, individualized consideration of individual circum-

stances, and the treatment of all people, including criminal defendants, as ends rather than as means.

ARGUMENT

I. Congress Has Directed that the Principle of Parsimony, Which Has Roots in Our Nation's Founding, Must Be the Touchstone of Federal Sentencing Decisions

In 18 U.S.C. § 3553(a), Congress required that district courts "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. That imperative—the principle of parsimony—is best understood by reference to its historical roots.

A. "All punishment which is not derived from necessity," wrote Montesquieu in 1748, "is tyrannical." Baron Charles de Montesquieu, The Spirit of the Laws, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This simple but profound idea was to have immense influence on criminal law reformers from the eighteenth century to the twentieth. Indeed, Spirit of Laws "was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 811 (1975).

Writing in 1764, the great Italian criminologist Cesare Beccaria openly acknowledged his debt to Montesquieu in formulating his own philosophy of punishment:

> Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's

> right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare M. Beccaria, An Essay On Crimes and Punishments 20 (Adolph Caso ed. 1984) ("Caso"). Beccaria's basic insight, which he derived from Rousseau's theory of the social contract, was that each individual, in forming political society, "would choose to put into the public stock the smallest portion possible" of his liberty, "as much only as was sufficient to engage others to defend it." *Id.* at 21. For that reason, punishment must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.* Beccaria thus argued that all punishments that "exceed the necessity of preserving" the bonds holding individuals together in society "are in their nature unjust." *Id.*

Influenced by Beccaria, the English philosopher Jeremy Bentham advocated a very similar doctrine, although he justified it in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*" Jeremy Bentham, An Introduction to the Principles and Morals of Legislation, ch. XIV, para.13 (1781). Parsimony, according to Bentham, derives from a straightforward cost-benefit calculus: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. The fact that this same principle of punishment could be grounded in both the social-contract and the utilitarian traditions undoubtedly helps account for its widespread acceptance and importance in the years to come.

And, indeed, these thinkers and their ideas had an immense influence on the founding generation in America. "In

every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813; see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (observing that "Beccaria and his French and Englisn followers influenced American thought in the critical years following our Revolution."). An American edition of Beccaria's treatise possibly appeared as early as 1773, and certainly no later than 1776. See Caso 7 (Editor's Introduction). In the years between the signing of the Declaration of Independence and the ratification of the Constitution, "the book appeared in translation in practically every cultural center of Europe and America." *Id.* During this period, American lawyers and political leaders were making serious efforts at legal reform, attempting to bring American law into greater harmony with the principles of justice and liberty that animated the Revolution more generally. See Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 814-16. In particular, "a general perception existed that a need existed to ameliorate the criminal penalties." Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST., 55, 79 (2004). The European theorists who advocated for parsimony in the meting out of criminal punishments provided much of the intellectual horsepower for these reform efforts. *Id.* at 78-79.

Thomas Jefferson, in particular, was deeply influenced by Beccaria. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89 (2005). Jefferson's work in the 1770s as part of the Virginia Committee of Revisors for the reform of the State's legal system drew on Beccaria's insistence on strict proportionality between punishment and crime. The annotations to Jefferson's 1778 "Bill for Proportioning Crimes and Punishments" contain multiple references to Beccaria's treatise, and in a later letter, Jefferson noted that "'Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death.'" Schwartz &

Wishingrad, *supra*, 24 BUFF. L. REV. at 818. John Adams was intellectually indebted to Beccaria as well. Adams owned a copy of the 1775 London edition of *On Crimes and Punishments*, and he thought highly enough of Beccaria's work both to give the book as a gift to his son in 1800, see Caso at 9, and to quote Beccaria during his famous defense of the British soldiers accused of murder during the Boston Massacre, see Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813-14.

B. As the text of § 3553(a) indicates, the Enlightenment-era insights of Montesquieu, Beccaria, and Bentham that punishment must be not greater than necessary to advance a particular objective are not some moribund historical curiosity. Through the work of scholars whose efforts at criminal law reform echoed that of the founding generation, the principle of parsimony was given new currency in the twentieth century. Foremost among these reformers was Norval Morris of The University of Chicago Law School. Morris identified parsimony as one of the basic norms that must guide any legitimate sentencing process. See generally Michael Tonry, *Preface*, 32 CRIME & JUSTICE vii, viii (2004) (describing Morris as "a criminal-justice institution builder of unmatched influence, and his ideas about punishment have transformed the ways people think"). In Morris's influential formulation, the parsimony principle stated that "[t]he least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974); see also Tonry, *supra*, 32 CRIME & JUSTICE at ix (explaining that "a principle of parsimony requires imposition of the least severe applicable punishment unless good, empirically grounded reasons exist for doing more"). Like Beccaria, Morris argued that parsimony is not merely a utilitarian virtue, but also a moral imperative. Morris thus wrote that a "system of criminal justice that is not infused with parsimony in punishment * * * creates an intolerable engine of tyranny." Norval Morris, Madness and the Criminal Law 155 (1982).

Although Morris was uniquely influential, he himself observed that he was hardly alone in advocating parsimony as the touchstone of criminal sentencing. He noted that a presumption in favor of less severe punishments "pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond social need is, presumably, what defines cruelty." Morris, *supra*, 72 MICH. L. REV. at 1163. Thus, in endorsing the parsimony principle, Morris was "on well-trodden ground"; the "American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and two recent national crime commissions have advocated parsimonious use of imprisonment." Andrew Rutherford, *A Review of Norval Morris' The Future of Imprisonment*, 66 J. CRIM. & CRIMINOLOGY 380, 383 (1975).

The widespread acceptance of the parsimony principle in our own time should come as no surprise. Indeed, it seems almost intuitive to say that punishment not limited by a principle of parsimony is both immoral and wasteful; such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). In pursuing the goal of parsimony, therefore, it must always be remembered that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). Moreover, this emphasis on the need to justify a particular quantum of punishment against a set of defined goals illustrates that the parsimony principle includes both a substantive and a procedural dimension. Substantively, it "limits punishments to the least restrictive sanction possible," while procedurally, it "requires the state to prove why the offender deserves a particular punishment." *Id.* at 1015.

C. Just as parsimony is not an eighteenth century relic, neither does it find a home only in the academic library or

lecture hall. To the contrary, it is now a congressional command. When Congress enacted the Sentencing Reform Act of 1984 (SRA), it distilled the philosophical idea of parsimony into the statutory requirement that district courts "*shall impose a sentence sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a) (emphasis added). Implicitly acknowledging Morris's understanding that parsimony requires a set of defined social purposes for punishment, paragraph (2) seeks to capture the four generally accepted justifications of criminal punishment. These are: retribution (subparagraph (A)); deterrence (subparagraph (B)); incapacitation (subparagraph (C)); and rehabilitation (subparagraph (D)). Congress's decision to include a parsimony requirement in the SRA was hardly radical. In fact, given the central role that the parsimony principle occupied in sentencing reform circles in the years leading up to the enactment of the SRA (which was nothing less than an implementation of the Founders' values), it arguably would have been more remarkable had the new law *not* accounted for the concept of parsimony.

As originally enacted, however, the command to impose sentences based on the principle of parsimony stood in direct tension with a rival statutory obligation. At the same time that § 3553(a) instructed judges to impose a parsimonious sentence, § 3553(b)(1) instructed them that "the court shall impose a sentence of the kind, and within the range," provided by the applicable provision of the Sentencing Guidelines. *Booker*, 543 U.S. at 259 (Breyer, J.). In *Booker*, this Court noted the patent conflict between § 3553(a) and § 3553(b)(1): "While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 233-34 (Stevens, J.).

The tension created by these competing sentencing directives was a product of the SRA's convoluted legislative history and the realities of political compromise. The Senate was the primary force behind the federal sentencing reform effort, and most of the provisions of the final bill originated in that body. This was true of § 3553(b)(1). See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 271 & n. 296 (1993). The parsimony directive, however, originated in the House of Representatives. A bill sponsored by Representative Conyers and reported out of the House Judiciary Committee in June 1984—a bill that was more in line with a system of advisory guidelines—included a provision directing judges "to impose the sentence (whether or not a departure from advisory guidelines) that *would be the 'least severe' sufficient to serve the purposes of sentencing*." *Id.* at 262 (quoting H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added)). In October 1984, "Senator Mathias succeeded in obtaining an amendment to add a new first sentence to the directives to the sentencing court along the lines suggested by Representative Conyers." *Id.* at 271. It was this amendment (co-sponsored by Senator Thurmond) that added the "sufficient, but not greater than necessary" language eventually codified in § 3553(a). See *id.* at 271-72; 130 CONG. REC. 29,870 (1984).

Under the House bill, the obligation to impose a sentence consistent with the principle of parsimony—rather than the Guidelines—would have been the primary command given to the district courts. Thus, where the Guidelines suggested a sentence that the court deemed more severe than necessary, the Guidelines would have had to give way. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. When the parsimony directive was added to the Senate bill, however, it was forced to vie for influence with what became § 3553(b)(1)'s command to abide by the Guidelines. Because Congress never addressed, much less resolved, the tension, *id.*, the courts and the Sentencing Commission were left to work it out.

But, instead of confronting the statutory contradiction as a problem to be solved through ordinary principles of construction, the courts "essentially ignored not only the parsimony language, but the entire set of congressional directives to judges in 3553(a)." Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999). Indeed, the parsimony provision became "almost hortatory in practice when placed against the mandate that erects a presumption in favor of the guideline sentence." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. The obligation to impose a Guidelines-compliant sentence thus ultimately trumped the requirement of parsimony. That triumph of § 3553(b)(1) was ensured primarily by two factors: this Court's repeated admonitions that the Guidelines were to be followed, see, *e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993); *Williams* v. *United States*, 503 U.S. 193, 198 (1992), and the ever-present threat of appellate reversal for judges who strayed from what the Guidelines required, see 18 U.S.C. § 3742(e)(3)(B)(ii); *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).[2]

All of that changed, however, with the decision in *Booker*. The remedial majority opinion resolved the conflict between the parsimony directive and the Guidelines sentencing command by invalidating the two provisions of the SRA that had kept the parsimony directive from playing its proper role in the federal sentencing process for the previous two decades. *Booker*, 543 U.S. at 259 (Breyer, J.) (holding that § 3553(b)(1) and § 3742(e) had to be severed and excised). The result of this statutory surgery is that the parsimony di-

[2] The hegemony of § 3553(b) was not an inevitable (or necessarily correct) outcome. See, *e.g.*, *United States* v. *Davern*, 937 F.2d 1041, 1042 (6th Cir. 1991) (en banc) (Merritt, J., dissenting); *United States* v. *Denardi*, 892 F.2d 269, 276 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (arguing that the parsimony directive was binding and had to be followed every bit as much as § 3553(b)).

rective in § 3553(a) now stands as the sole substantive mandate that binds district judges when they impose sentences. *Id.* at 261. Federal courts therefore must take the congressional command of parsimony seriously at every step of the sentencing process. In this sense, the SRA now resembles something akin to the original House bill described above. As in that bill, the Guidelines now exist *only* as advisory provisions that a sentencing court must consider, but before which it need not bow. *Booker*, 543 U.S. at 246, 264. The parsimony directive has now prevailed, and the obligation to impose a sentence "sufficient, but not greater than necessary" to achieve the specified purposes of sentencing is now preeminent. When that obligation clashes even slightly with the sentence suggested by the now-advisory Guidelines, it is the Guidelines that must give way.

II. Presumptions In Favor of the Guidelines, and Standards of Review that Accord Special Weight to the Guidelines, Are Inconsistent with the Commands of Congress Set Forth in 18 U.S.C. § 3553(a)

A. In the wake of *Booker*, federal sentencing policy remains a statutorily defined system. Now, however, *every* sentencing factor enumerated in § 3553(a), not merely § 3553(a)(4), must be respected. Any analysis of what reasonableness review should entail, therefore, must begin with a careful look at what the text of § 3553(a) requires, and what it does not.

Section 3553(a) includes both a substantive command and a procedural one. The substantive command is, of course, the requirement of parsimony: the district court must impose a sentence that is no more severe than necessary to achieve the purposes of punishment set forth in § 3553(a)(2). To discharge this obligation, a sentencing court must take into account each different purpose of sentencing and determine how each of them would (or would not) be advanced by reducing (or increasing) a quantum of punishment. The procedural command, which compels the sentencing court to "consider" each enumerated factor (necessarily before com-

plying with the substantive directive), reinforces the overarching substantive obligation to impose a parsimonious sentence. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 82-83 (2005) (factors are to be considered "subject to the overall requirement of parsimony"). Each directive is mandatory: the sentencing court *must* consider each of the sentencing factors that Congress has prescribed, and then, with that set of considerations in mind, *must* act parsimoniously.

The seven specific factors that § 3553(a) instructs district courts to consider are:

- "the nature and circumstances of the offense and the history and characteristics of the defendant";
- the four general purposes of punishment;
- the "kinds of sentences available";
- the applicable guideline range;
- "any pertinent policy statement" of the United States Sentencing Commission;
- the need to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and
- the "need to provide restitution" to victims.

18 U.S.C. § 3553(a)(1)-(7). The requirement that the court "consider" each of these elements reflects the importance of two basic—and we think indispensable—components of just sentencing: individualized tailoring and reasoned judgment. The kind of consideration mandated by § 3553(a) ensures *both* that the ultimate sentence is appropriate to the particular facts and circumstances of the individual defendant *and* that it is the product of a clear and established set of principles and standards.

The consideration process begins with a careful evaluation of the specific individual who stands before the court.

See 18 U.S.C. § 3553(a)(1).[3] The judge must ask who that person is and how he or she came to commit the crime. The court must also ask how serious the offense was, how likely the defendant is to commit other crimes, and whether there is a reasonable possibility that particular sentencing options will help that defendant rehabilitate or become a more productive member of society. Once those issues have been considered, the court must then ponder the sentencing range under the relevant Guidelines provisions, as well as any formal statements put forward by the Sentencing Commission. As with all of the § 3553(a) factors, however, the court's obligation is only to "consider" the work of the Commission; there is no longer any applicable statutory requirement of deference or obedience either to the guideline range or to any policy statement.

The mandatory consideration process also facilitates reasoned decision-making. By examining each of the § 3553(a) criteria, judges are compelled to reflect on general principles of punishment and the myriad elements that make up a criminal sentence. The procedural directive contained in § 3553(a) is designed to "encourage sentencing judges to exercise their own judgment regarding the purposes of sentencing and the factors relevant to sentencing." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 271. Performed as intended, therefore, the consideration process does not entail the checking of items on a list; instead, it is an occasion for the sentencing judge to make a reasoned moral choice about how to punish a person most appropriately in light of all the facts and circumstances of his or her case. One important consequence of this process is that it requires every sentencing court to take full moral and legal responsibility for the sentence imposed. No longer can a judge deflect responsibility

[3] We do not suggest that the statute must be construed to require a district court to consider the enumerated factors in the order stated. For example, a judge might find it prudent first to consider what limits may exist on the range of lawful choices, as required by § 3553(a)(3).

onto the bureaucracy of the Sentencing Commission or take refuge behind a numerical grid. Such direct accountability requires the exercise of "deliberation and moral judgment," Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1256 (1997)—something that is a profoundly important part of the traditional craft of judging, but that has been lost in the era of mandatory Guidelines.

Sentencing based exclusively on the Guidelines represented the triumph of "bureaucratic penalization," in which individualized consideration and reasoned judgment were jettisoned in favor of uniform administrative regulations and routine arithmetic. *Id.* at 1254; see also Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (stating that the sentencing process under the Guidelines could almost be "performed by a computer or an accountant"). That is no longer so. Whereas mandatory Guidelines sentencing pursuant to § 3553(b)(1) and § 3553(a)(4) tended to transform defendants into "kinds of persons, abstract entities to be defined by a chart," the sentencing procedure called for by § 3553(a) allows judges, indeed commands them, to "consider the circumstances of the crime and of the defendant in their entirety and to form a judgment on that basis." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1263. In this regime, human judgment has supplanted mechanical calculation as the primary feature of the federal sentencing process.

At the same time, the statutory scheme in the post-*Booker* context avoids what were often seen as the critical deficiencies of the federal sentencing process before enactment of the SRA—its "failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles." *Id.* at 1254. To the contrary, § 3553(a) provides specific criteria for the sentencing court to consider. Those criteria include provisions aimed at ensuring that individualization does not result in the kinds of unjust

and unwarranted sentencing disparities that can be seen to mock the rule of law. See *Booker*, 543 U.S. at 264-65 (Breyer, J.) (observing that the system remaining after *Booker*, "while not the system Congress enacted," nonetheless works "to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary"). And, of course, as discussed in greater detail below, an integral part of the remedial majority opinion in *Booker* was its recognition that an appropriate role exists for appellate review in the sentencing process. *Id.* at 260-64. These features ensure that the sentencing process is one distinguished by appropriately *bounded* discretion. See *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) ("limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike"). It allows for individualized consideration without the risk of surrendering to arbitrariness or anarchy.

B. Applied as written, § 3553(a) calls for a sentencing process that preserves many of the virtues of the regime that existed before *Booker* while reining in (and potentially eliminating) many of its vices. It is unfortunate, therefore, that many courts of appeals—including the courts below in the present cases—have misinterpreted that provision by holding that there should be a presumption in favor of the reasonableness of a within-guideline sentence (or, similarly, by manufacturing a requirement that a substantial variance from the Guidelines can be justified only by "extraordinary circumstances"). Such contrivances are not supported by the post-*Booker* statutory scheme or by *Booker* itself. They are constitutionally problematic because they re-inject into the sentencing process the types of features that led the Court to hold in *Booker* that an enhanced guideline sentence based on facts not authorized by a jury verdict violates the Sixth Amendment. And from a practical perspective, they are simply not necessary to ensure the salutary goal of ensuring individualized sentencing while minimizing unwarranted sentencing disparities.

As an initial matter, the statutory text does not support either a rule that presumes the reasonableness of a guideline sentence or a standard that deems a variance from the guideline range reasonable only in extraordinary circumstances. Nothing in § 3553(a) even *hints* at giving an across-the-board preference for one of the factors it enumerates, be it the Guidelines or otherwise, over the rest. Indeed, the various opinions in *Booker* explicitly recognized that the statute affords no special weight to the Guidelines, but instead treats them merely as one element to be considered among a variety of others. See *Booker*, 543 U.S. at 259-60 (Breyer, J.) (§ 3553(a) "requires judges to take account of the Guidelines *together with other sentencing goals*") (emphasis added); *id.* at 300 (Stevens, J., dissenting in part) (the guideline range "is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a)"). Thus, as Justice Scalia observed, "under § 3553(a), [district judges] will need only to 'consider' that range as one of many factors," and the "*statute provides no order of priority among all those factors.*" *Id.* at 304-05 (Scalia, J., dissenting in part) (emphasis added).

Reading a pro-Guidelines presumption into the SRA is also decidedly at odds with the structure of the statute as it exists in its post-*Booker* form. The original Senate bill, introduced in 1977, called for a largely advisory guidelines system; "it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a 'clearly unreasonable' standard." *Id.* at 293 n.12 (Stevens, J., dissenting in part). Subsequently, however, the Senate amended the bill to include a directive to the sentencing court to impose a guideline sentence unless there was an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission. Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 245. That provision, which of course became § 3553(b)(1), was added to the bill precisely in order to "set a

clear *presumption* favoring the Guideline sentence, requiring sentencing judges to sentence within the guideline range except in the rare case." *Id.* at 271 (emphasis added). As Senator Kennedy explained on the Senate floor, this provision was intended to "'make clearer the basic *presumptive* aspects of the guidelines.'" *Id.* at 245 (emphasis added) (quoting 124 CONG. REC. 383 (1978)). Now that *Booker* has excised § 3553(b)(1), the pro-Guidelines presumption embodied in that provision has necessarily evaporated.

Given the remedial holding in *Booker*, a presumption in favor of the reasonableness of a Guideline sentence could be justifiable only insofar as such a sentence is in fact likely in all cases to satisfy the requirements of § 3553(a). Cf. *Leary* v. *United States*, 395 U.S. 6, 36 (1969) (a presumption is "irrational" and "arbitrary" unless "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). But that premise cannot be proven. Indeed, it is utterly fanciful to assume that a guideline range is intended to correspond, or generally even will, with § 3553(a)'s overarching obligation of parsimony and its enumerated sentencing factors.

In the first place, Congress's decision to include the Guidelines as just one of seven enumerated factors is powerful evidence that the legislature never expected that consideration of the Guideline range alone would be sufficient either to discharge the procedural requirements of § 3553(a) or to achieve the kind of substantive sentencing result that the "sufficient, but not greater than necessary" language demands. Nor does the legislative history of the SRA give any hint that Congress viewed Guideline sentencing as the equivalent of parsimonious sentencing. Indeed, as discussed above, that history—including the tension between § 3553(b)(1) and § 3553(a) that was not resolved until *Booker* was decided—suggests quite the opposite.

For its part, the Sentencing Commission *could* have shaped the Guidelines with the parsimony directive in mind, but it has not done so. For example, notwithstanding § 3553(a)(1)'s unlimited reference to "the history and characteristics of the defendant," the Commission has significantly circumscribed a district judge's ability to consider, under § 3553(a)(4), a defendant's history and characteristics. The Commission has thus determined that certain factors are *never* relevant (a disadvantaged upbringing (§ 5H1.12); drug or alcohol dependence (§ 5H1.4); and economic hardship (§ 5K2.12)) and that other factors are relevant *only* in extraordinary circumstances (age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities (§ 5H1.6); and record of prior good works (§ 5H1.11)). See also *Koon* v. *United States*, 518 U.S. 81, 95-96 (1996) (describing factors as "forbidden," "discouraged," and "encouraged"). In practice, therefore, the aim of a Guidelines sentence was not to impose a sanction "that would best achieve any of the purposes of sentencing," or one that was sufficient but not greater than necessary to meet those objectives; instead, the purpose was "nothing more and nothing less than compliance with the Sentencing Guidelines." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1264.

C. Devices such as those created by the courts below also raise constitutional problems because they tend to fuse back together the two elements (judicial fact-finding and binding guidelines) that *Booker* decisively separated. See *Booker*, 543 U.S. at 233 (Stevens, J.). In other words, the decisions below limit judicial discretion without affording any role for the jury. That is simply not consistent with *Booker*. Although one or more Members of this Court might ultimately have preferred to leave in place a sentencing regime in which judges could continue to apply guidelines that would carry extra weight, the remedial majority plainly em-

phasized that "that is not a choice that remains open." *Id.* at 265 (Breyer, J.).

As *Booker* makes clear, a truly advisory guideline system is distinguished by the sentencing court's freedom to impose a sentence outside of the suggested guideline range. Thus, the departure authority in the Guidelines was insufficient to let them pass constitutional muster because "departures are not available in every case, and in fact are unavailable in most." *Id.* at 234 (Stevens, J.). That is also why the remedial majority excised § 3742(e), which required appellate courts to evaluate whether the sentence departed from the Guideline range based on a factor "not authorized under section 3553(b)," 18 U.S.C. § 3742(e)(3)(B)(ii). That provision used the appellate review function to constrain the ability of district courts to sentence outside of the guideline range and thus brought the Guidelines into conflict with the Sixth Amendment.

Against this backdrop, the "extraordinary circumstances" requirement adopted by the Eighth Circuit makes the Guidelines virtually indistinguishable from the unconstitutional sentencing regime struck down in *Blakely* v. *Washington*, 542 U.S. 296 (2004). Under that regime, as the Court explained in *Booker*, "the Washington statute allowed the judge to impose a sentence outside the sentencing range for 'substantial and compelling reasons.'" 543 U.S. at 234 (Stevens, J.). Because not every case presents substantial and compelling reasons for departing, the guideline range would in some instances be mandatory and thus incompatible with the Sixth Amendment. *Blakely*, 542 U.S. at 304. There simply is no valid constitutional distinction between a rule forbidding significant departures except in "extraordinary circumstances" and a rule forbidding departures except for "substantial and compelling reasons." Indeed, as in *Blakely*, the holding below that "the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances," Claiborne Pet. App. 3,

had the effect of making the non-Guideline sentence legally impermissible. As a result of the Eighth Circuit's newfangled rule, there is now a non-trivial set of cases in which an out-of-guideline sentence will be unavailable as a matter of law. That flies in the face of both *Blakely* and *Booker*.

III. "Reasonableness" Review Should Focus on Whether the District Court Has Considered Its Obligations Thoroughly, Articulated Its Reasons Fully, and Infused Every Aspect of Its Sentencing Determination with the Principle of Parsimony

The statute's text and structure should be the lodestar for defining and applying the "reasonableness" standard of review. After *Booker*, the obligation of a district judge is to impose an individualized sentence that "consider[s]" the various factors set forth in § 3553(a), giving those factors the weight the judge thinks appropriate in the circumstances, each one subject to the overarching requirement of parsimony. The purpose of appellate review in this scheme is simply, but importantly, to ensure that district courts do not stray unreasonably from those statutory requirements. Several important points about the nature of post-*Booker* reasonableness review follow from this basic understanding.

A. Whether a sentence is imposed within a guideline range, above the range, or below it, reasonableness review should involve the same criteria. Indeed, one of *Booker*'s central messages is that a sentence may no longer be insulated from meaningful appellate review merely because it falls within a particular numerical range. That was the situation before *Booker*, as a result of 18 U.S.C. § 3742.[4] Subsection (e) of that provision created a system of differential appellate review depending on whether a sentence was inside or

[4] It was also the situation before the enactment of the SRA, when any sentence within the *statutory* range was effectively unreviewable for severity. See *Koon* v. *United States*, 518 U.S. 81, 96 (1996). Procedural violations, of course, were subject to review on appeal.

outside the applicable guideline range. Sentences outside the range were subject to de novo review and could be invalidated if the court of appeals deemed the departure legally impermissible or "unreasonable." 18 U.S.C. § 3742(e)(3), (f). In contrast, sentences within the range could be invalidated only if they were imposed "in violation of law" (for example, if the district court erred in calculating the applicable range). 18 U.S.C. § 3742(e)(1). Under that regime, therefore, a sentence within a properly calculated Guideline range was effectively unreviewable, in the absence of procedural error or a misapprehension of the scope of discretion. See, *e.g.*, *United States* v. *Woodrum*, 959 F.2d 100, 101 (8th Cir. 1992) (per curiam); *United States* v. *Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990).

But no longer. In invalidating and excising § 3742(e), the remedial majority in *Booker* replaced that two-tiered approach to appellate review with a single "reasonableness" standard, one that, the Court explained, was to be applied "across the board." 543 U.S. at 263 (Breyer, J.). Thus, *Booker* collapsed the difference between sentences within and outside the applicable guideline range for the purpose of appellate review. The effect of this statutory surgery was to impose for *all* sentences a standard of appellate review that has, as an analogue, the reasonableness standard used to evaluate *out-of-guideline* sentences before the enactment of the PROTECT Act in 2003. See *id.* at 261.[5] A presumption of reasonableness has no place in this new regime, because its purpose and effect are to subject a within-guideline sentences to less searching scrutiny than a sentence that falls

[5] The PROTECT Act amended the SRA to provide, among other things, that an out-of-guideline sentence, even if not unreasonable by its own terms, could be reversed merely because the district court departed based on a factor "not authorized under section 3553(b)." Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 § 401(d)(1), 117 Stat. 670.

outside of the guideline range. That is inconsistent with the unitary standard of review that *Booker* requires.

B. Procedural correctness, supported by a proper statement of reasons, should be powerful evidence that a sentence is reasonable. Under § 3553(a), proper sentencing decisions entail the consideration of multiple elements. The mandate that a district court "shall consider" those elements is integral to ensuring that courts do not abuse the considerable discretion they have to fashion criminal sentences. The mandate, in other words, helps to ensure that sentences are the product of reasoned judgment, rather than mere whim. See *supra* II.A. And the importance of *using* reason is reinforced by the requirement of *giving* reasons. That is why the SRA requires a district court to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c).

Along with encouraging reasoned judgment, the procedural mandates in § 3553(a) and § 3553(c) improve the sentencing process by facilitating appellate review. After all, meaningful review of the reasonableness of a sentence imposed pursuant to a directive to consider a number of statutory factors is possible only to the extent that the district court actually provides some objective indication that it has indeed considered the statutory requirements. Cf. *United States* v. *Taylor*, 487 U.S. 326, 343 (1988) (observing that "thorough appellate review" of decisions made under the Speedy Trial Act requires that a district court "carefully express its decision . . . in terms of the guidelines specified by Congress"). If the district court's consideration process is extensive, is well-documented, and reflects precisely how the various § 3553(a) factors were considered in the context of the particular defendant's case, the appellate court should be most reluctant to condemn the resulting sentence as unreasonable.

On the other hand, an appellate court will have more justification in viewing as unreasonable a sentence that is not supported by well-stated reasons. Thus, if a district court imposes a sentence without a substantial and thorough expla-

nation of how it examined the sentencing factors specified in § 3553(a)—*e.g.*, a terse on-the-record statement, no written discussion—a reviewing court rightfully will have little confidence that the ultimate sentence is the kind of parsimonious and well-considered punishment required by the statute. Accordingly, "any sentencing decision that fails to thoroughly and thoughtfully address the congressional directives of section 3553(a) must be considered suspect." Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 143 (2006). This is not to say that a procedurally correct sentence should *invariably* be upheld. See II.C. *infra*. But it *is* to say that the fundamental task of an appellate court engaged in reasonableness review should be to ensure that the procedural requirements of § 3553(a) have been satisfied. The extent to which a district court imposes a procedurally correct sentence should, except in the rarest case, strongly correlate with whether the sentence is reasonable.

This approach to reasonableness review is further supported by "[d]ifferences in the institutional competence of trial judges and appellate judges." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). After all, it is a not particularly difficult for appellate courts to determine whether district judges have stated with sufficient clarity and thoroughness the factors that went into their decisions and the reasons that led them to impose the sentence that they ultimately selected. Such matters may readily be reviewed on a paper record. Indeed, "under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon*, 518 U.S. at 98.

In contrast, it is far more taxing (and fraught with risk) for appellate courts to engage in a searching review of a district judge's subjective, discretionary act of selecting an individual sentence. As this Court has recognized:

> "Face to face with living witnesses the original trier of the facts holds a position of advan-

> tage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * * How can we say the judge is wrong? We never saw the witnesses * * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal."

Marshall v. *Lonberger*, 459 U.S. 422, 434 (1983) (quoting *Boyd* v. *Boyd*, 169 N.E. 632, 634 (N.Y. 1930)). Cf. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967) (noting that because trial courts have "firsthand knowledge of witnesses, testimony, and issues," they have a greater "'feel' for the overall case"). The institutional advantage of the district courts explains why, before the SRA was enacted, district courts were afforded broad discretion to impose sentences, and appellate review of substantive sentencing outcomes was virtually unavailable. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431-32 (1974). Indeed, this Court has held that "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams*, 503 U.S. at 205 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)).

Booker does nothing to disturb that basic principle. To the contrary, the "reasonableness" standard it adopted was in explicit contrast to the searching kind of appellate review of discretionary sentencing decisions that had been mandated in the PROTECT Act provision (18 U.S.C. § 3742(e)) invalidated by the remedial majority. See *Booker*, 543 U.S. at 260-61. That excision (subject to the other changes wrought by *Booker*) effectively returned the law to where it was when this Court said in *Williams* that, although the SRA "established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams*, 503 U.S. at 205. As this Court stated in *Koon*, "deference

[is] owed" to the district court because it is clearly the "'judicial actor * * * better positioned * * * to decide the issue in question.'" *Koon*, 518 U.S. at 99 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988)).

C. Although reasonableness review should be defined largely by its insistence on procedural correctness, it is not without a substantive component. In some cases, the record may reflect that a sentencing result, although procedurally proper, is nonetheless arbitrary and capricious and manifestly irrational. Any time that a reviewing court questions the outcome, however, it runs the risk of substituting its judgment for the decision of the judicial officer who is in an institutionally superior position to determine the appropriate sentence. To minimize that risk, and to avoid the possibility that the courts of appeals will again devise standards (as the courts below did in the present case) that improperly limit the discretion of district courts, this Court should make clear that a sentence imposed in a procedurally correct manner is subject to reversal only if the reviewing court concludes that the sentence is arbitrary and capricious and manifestly irrational, or if, as we discuss next, the sentence runs afoul of the principle of parsimony.

D. Given the overarching parsimony command of § 3553(a), an appellate court engaged in substantive reasonableness review should ask itself the same fundamental question that Montesquieu, Beccaria, Bentham, and Norval Morris contemplated: Was the district court reasonable in concluding, or did it fail to ascertain, that the judgment of sentence represents the *least severe* punishment necessary to achieve the specified purposes of the criminal law? That is because "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing specified in § 3553(a)(2). *United States* v. *Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006). Just as the procedural mandate that a district court "shall consider" the prescribed sentencing factors must in-

form the appellate review process, so too must the normative mandate that the district court impose a parsimonious sentence. Accordingly, if the appellate court is *not* convinced that the district judge reasonably concluded that he or she imposed the least burdensome punishment that would have satisfied the specified purposes of punishment, the unparsimonious sentence should be vacated. In this way, appellate review plays an important role in ensuring that punishment is never imposed wastefully or gratuitously.

* * *

If the Court animates the concept of reasonableness review with the principles that we have discussed, FAMM believes that the federal sentencing process not only will comply with the law as written, but will also come closer to being a truly just and humane system of punishment. Respecting the statutory command of parsimony will foster and embody the importance of respecting the law as written. Requiring courts to consider carefully the various purposes of punishment and to explain their sentences openly and rationally ensures that individual circumstances will receive individualized consideration and that sentences will be based on the exercise of reason rather than caprice. And, finally, remembering that punishment requires moral justification, and that it imposes significant costs on individuals that must always be justified, ensures that all people—including criminal defendants—are treated as ends rather than as means.

CONCLUSION

The judgments of the courts of appeals in both 06-5618 and 06-5754 should be reversed.

Respectfully submitted.

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Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VICTOR A. RITA, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-guideline sentences?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, save the two representing Petitioners in this matter. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts, and we represent thousands of individuals who are sentenced each year. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their attorneys and other staff. The issues presented in these cases are of obvious importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

As daily participants in federal sentencing, *amici* offer an accounting, both statistical and anecdotal, of sentencing practices in district and appellate courts after *United States v. Booker*, 543 U.S. 220 (2005). The sum of that accounting is troubling and drives our view that the Guidelines should not be accorded a presumption of reasonableness.

Our experience is that the presumption of reasonableness for within-guideline sentences reflects institutional resistance to *Booker*, and that the circuits that

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[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. S. Ct. Rule 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

have adopted it have lost sight of the fundamental rationale of *Booker* and of *Blakely v. Washington*, 542 U.S. 296 (2004). The Constitution forbids the equivalent of conviction without the fundamental components of the adversary system the Framers intended. After *Booker*, guideline ranges continue to be increased based on information that has not been charged, has not been proven, has not been subject to confrontation, and in many cases comes from unreliable sources. Under such circumstances, it is wrong to afford sentences that fall within guideline ranges a presumption of reasonableness, as seven courts of appeals do.

In turn, presumption circuits over-emphasize the role of the Guidelines in sentencing decisions. As a result, attempts by sentencing judges to take into account the good in a defendant's life history when imposing punishment, an exercise clearly contemplated by *Booker*, are rebuffed as contrary to the Guidelines' view that such considerations are to be discouraged, or are "not ordinarily relevant," or are not relevant at all. But these same circuits apply a different, highly deferential standard of review to sentences above guideline ranges. The use of multiple standards of review in presumption circuits is contrary to *Booker*, which held that sentences are to be reviewed for reasonableness "across the board." *Booker*, 543 U.S. at 263. Thus, presumption circuits have, *de facto*, adopted a system that "impose(s) Guideline-type limits upon a judge's ability to reduce sentences, but . . . [does] not impose those limits upon a judge's ability to *increase* sentences," a "one-way lever[]" that was flatly rejected by this Court. *Id.* at 266 (emphasis in original).

Because the presumption of reasonableness acts as a one-way ratchet and allows sentencing ranges based on unreliable factual determinations, it is contrary to *Booker* and should be rejected.

ARGUMENT

I. INSTITUTIONAL RESISTANCE HAS HINDERED IMPLEMENTATION OF *BOOKER*.

The discussion of post-*Booker* data and cases that follows in Parts II and III is illuminated by reviewing the political context that gave rise to the presumption of reasonableness. In the wake of *Booker*, the Sentencing Commission and the Department of Justice (DOJ) acted swiftly to advance the argument that the Guidelines should be presumed reasonable because they already incorporate all of the purposes and factors in 18 U.S.C. § 3553(a), and other congressional directives. While this argument was no more than *ipse dixit*, it took hold, and spawned the presumption of reasonableness.

A. The Sentencing Commission.

In the nearly two years since *Booker* was decided, it has yet to be mentioned in the *Guidelines Manual*. The Guidelines have been amended five times since January 12, 2005. Amendments adopted since *Booker* include changes, generally resulting in higher penalties, to a wide range of crime including child pornography, possession of steroids, copyright violations, firearms and immigration offenses. Some were made at the direction of Congress, many others came of the Commission's own accord. Some were "technical and conforming amendments to various

Guidelines" (*e.g.*, U.S.S.G. App. C, amends. 679-680), and others were passed to address "problematic areas" and "issues" pertaining to Guideline applications (*e.g.*, *id.*, amends. 684, 691, 692). Yet *Booker*, described as "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta* [*v. United States*, 488 U.S. 361 (1989)],"[2] was left unaddressed.

This inattention to *Booker* in the *Guidelines Manual* is significant. The *Guidelines Manual* is the source of information used for guideline calculations. Guideline calculations remain a component of the sentencing process and have primary significance in presumption circuits. U.S.S.G. § 5K2.0 describes the Commission's approach to a sentencing judge's departure authority. Relying on 18 U.S.C. § 3553(b)(1), § 5K2.0 severely limits a court's authority to sentence below guideline ranges. However, 18 U.S.C. § 3553(b)(1) was severed and excised in *Booker*. Yet, § 5K2.0 remains in the *Guidelines Manual* intact, "advising" against departures except in the rarest of cases, even though that advice rests on a statute that was voided as unconstitutional. And that advice is invoked time and again against defendants in circuits that accord the Guidelines a presumption of reasonableness.

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[2] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U. S. House of Representatives, March 16, 2006 (hereinafter "Testimony of Hinojosa, J., March 16, 2006"), available at http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf.

The Commission has acted to advance its position that *Booker* changed little. On February 10, 2005, the Commission offered testimony to the House Judiciary Committee's Subcommittee on Crime.[3] The Commission recognized an emerging conflict in the courts as to how to interpret *Booker*. One view would accord the Guidelines substantial weight in the sentencing process. The other would treat the Guidelines as one of a number of sentencing factors.[4] The Commission lined up with the former, asserting that "the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," and that the Commission "has considered the factors listed at § 3553(a)." Thus, the Commission argued, the Guidelines should be given "substantial weight" in the sentencing decision.[5] The Commission disseminated its position to

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[3] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005 (hereinafter "Testimony of Hinojosa, J., February 10, 2005"), available at http://www.ussc.gov/Blakely/bookertestimony.pdf

[4] The conflict referenced was that exemplified in *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) and *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

[5] Testimony of Hinojosa, J., February 10, 2005, *supra*, note 3.

judges, probation officers, and prosecutors across the country in training presentations and written materials.[6]

The very language used at the February 10, 2005, hearing soon appeared verbatim in an Eleventh Circuit opinion. "Indeed, the factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a)." *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005).

On March 16, 2006, the Commission again appeared before the House Judiciary Committee's Subcommittee on Crime to propose a legislative response to *Booker* which would accord the Guidelines substantial weight. In support of its proposal, the Commission cited *Shelton* for the proposition that "the factors set forth in 3553(a)(2) . . . are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," asserting that "the sentencing guidelines embody all of the applicable sentencing factors for a given

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[6] U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing Testimony of Hinojosa, J., February 10, 2005), on file with author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (Mar. 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

offense and offender."[7] This tautology has provided the primary justification for the presumption of reasonableness.[8]

B. The Department of Justice.

After *Booker*, DOJ swiftly adopted policies "advocating the consistent application of the Sentencing Guidelines."[9] On January 28, 2005, a directive to line Assistant United States Attorneys was issued that said prosecutors (1) "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases," (2) "must oppose" any sentence that "is below what the United States believes is the appropriate Sentencing Guidelines range," and (3) must report "sentences outside the appropriate Sentencing Guideline range."[10] At the same time, DOJ was looking to

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[7] Testimony of Hinojosa, J., March 16, 2006, *supra*, note 2.

[8] *See, e.g., United States v. Cage*, 451 F.3d 585 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *United States v. Peach*, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005).

[9] Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_Jan_28_comey_memo_on_ booker.pdf.

[10] *Id.*

Congress for a legislative response to *Booker*.[11] The government favored a "topless" or "minimum" Guidelines approach. In the form proposed by DOJ to the House Judiciary Committee hearing on March 16, 2006, "the sentencing guidelines minimum would return to being mandatory and again have the force of law, while the guidelines maximum sentence would remain advisory."[12]

Congress has taken no action. However, the combination of the Commission's and DOJ's advancement of the view that the Guidelines already account for § 3553(a) factors, and periodic threats of a legislative "fix," has stymied the development of sentencing law faithful to the principles in *Booker*.[13]

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[11] *See* Testimony of Christopher A. Wray, Assistant Attorney General, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005, available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf; Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech, Washington, D.C., June 21, 2005, available at http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm.

[12] Testimony of William W. Mercer, Principal Associate Deputy Attorney General, Before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 7, available at http://judiciary.house.gov/media/pdfs/mercer031606.pdf.

[13] Examples of how judicial concern over a legislative response to *Booker* influences sentencing decisions are found in *United States v. Wilson*, 350 F. Supp. 2d 1269, 1287-88 (D. Utah 2005); *United States v. Jiménez-Beltre*, 440 F.3d 517 (1st Cir. 2006) (Howard, J.,

The idea that the Guidelines account for all of the § 3533(a) factors is a matter of continuing concern in the district courts. Representative of that concern is *United States v. Raby*, where the sentencing judge lamented that he could not consider the age, mental health, and employment record of the defendant in imposing sentence. The court observed:

> I may not consider [age] without going against a presumption that the guideline is reasonable that tells me I can't consider age, that you will be 60 when you get out of prison. So, I can't talk – I can't do that.
>
> * * *
>
> Should I consider the fact that he is different from a youth and has never been convicted of a crime until he is 42, I would be branching into an area that the Sentencing Guidelines and their policy judgments seem to circumscribe and prohibit.
>
> So, someone with a Category I at age 17 is the same as a Category I, no criminal history, at age 60. So, the fact you live a

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concurring); *United States v. Grigg*, 442 F.3d 560 (7th Cir. 2006); *United States v. Vazquez-Rivera*, ___ F.3d ____, 2006 WL 3593482 (1st Cir. Dec. 12, 2006); and *United States v. Lopez-Cerda*, SA-05-CR-057, Transcript of Sentencing (W.D. Tex. July 6, 2005), available at www.fd.org/Lopez-CerdaTranscript7.6.05.pdf.

> law-abiding life and have never been convicted of a crime is treated exactly the same when you're 60 as it is when you're 20 under the Guidelines.

United States v. Raby, CR No. 2:05-00003, Transcript of Sentencing 22-23 (S.D. W. Va. Sept. 27, 2006), available at www.fd.org/ RabyTranscript9.27.06.pdf.

On the issue of employment, the court offered:

> Mr. Raby has been employed full-time for his adult life. But the Guidelines say it's reasonable for me not to pay a bit of attention to that. I am not to pay any attention to the fact that he has been a contributing member of society, has worked and eared a living. I'm not supposed to pay any attention to that because, as the Government argues, that's all taken care of by the Guidelines; the Guidelines are always reasonable about that.
>
> So, somebody that doesn't do a darn thing, lives a life of sloth and disrepute with regard to their employment, at least, is treated exactly the same as someone who works hard all their life. And it's not relevant for sentencing if one is to be reasonable, presumptively reasonable under the Guidelines.

Id. at 24.

And on mental health and the right to allocute:

> So, the fact that there are mental and emotional conditions which are clear in this case and inherent in cases such as this are not anything I can think about.
>
> I can't even, I suppose, take into account in that regard, or at least the Guidelines – I don't know why we have the right of allocution. This man made what I consider to be an extremely sincere statement. He's been truthful all along. He admits his sick and perverted view of children. But he's there under oath today and promises that he would not do it again no matter how tempted he would be to view child pornography.

Id. at 25.

Such frustrated colloquies are not atypical. Were the assertion underlying the presumption of reasonableness valid, this would not happen. But it is not. The Guidelines do not incorporate other § 3553(a) factors because the Guidelines cannot account for "the vast range of human conduct potentially relevant to a sentencing decision." U.S.S.G. Ch. 1, pt. A(a), (b) (1987). They are "inescapably generalizations" that "say little about the 'history and characteristics'" of our clients, except insofar as they "prohibit consideration of certain individualized factors [and] discourage – except in 'exceptional cases' – consideration of other individualized factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006)

(Lipez, J., dissenting). The presumption of reasonableness promotes Guideline calculations to a position more important than the lives of our clients, producing a body of troubling case law.

II. THE PRESUMPTION OF REASONABLENESS SKEWS APPELLATE REVIEW IN A MANNER INCONSISTENT WITH *BOOKER*.

A review of sentencing and sentencing appeal data post-*Booker* shows predictable trends. Defendants are denied meaningful sentencing consideration of their individual circumstances in presumption circuits. When judges attempt to take into account a defendant's life history in imposing below-guideline sentences in presumption circuits, the risk of reversal is astonishingly high; meanwhile, sentences above guideline ranges are rarely reversed. This happens because, contrary to *Booker*, presumption circuits apply differing standards of review to sentences within, below, and above the guideline range. The data and caselaw emphatically demonstrate this point.

A. Statistical Overview.

The gap between the rate of below-guideline sentences imposed by district courts in circuits that have returned the Guidelines to their presumptive status and that in circuits that have declined to do so has steadily widened. *See* Difference in Rates of Below-Guideline Sentences Imposed 1/12/05-11/27/06 (App. A-1). As of November 27, 2006, the rate in non-presumption circuits exceeded that in presumption circuits by 34.2%. *Id.* This gap is alarming and is clear evidence that, by presuming

that the Guidelines incorporate § 3553(a) purposes and factors when they do not, courts deny defendants consideration of mitigating life circumstances in the sentencing decision.

As dramatic as is this gap between below-guideline sentences imposed in presumption and non-presumption circuits, the pattern in the courts of appeals is even more disturbing. Below-guideline sentences appealed by the government were reversed in 78.3% of cases. In contrast, above-guideline sentences appealed by defendants were reversed in only 3.5% of cases, and within-guideline sentences appealed by defendants were reversed in a mere 1.4% of cases. *See* Court of Appeals Review 12/1/05-11/30/06 (hereinafter "Court of Appeals Review"), App. A-5, A-8.[14] Thus, any newfound discretion that judges may have appears to be "an escalator that only goes up," *United States v. McDonald*, 461 F.3d 948, 959 (8th Cir. 2006) (Bye, J., dissenting), creating unwarranted disparity, *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (Heaney, J., concurring), contrary to this Court's rejection of such one-way levers. *Booker*, 543 U.S. at 266.

In presumption circuits, 86.2% of below-guideline sentences appealed by the government were reversed, as compared to 60% in non-presumption circuits. Court of

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[14] The entire compilation of appeals court decisions used in preparing the comparative analyses included in the Appendix at A-5 – A-17 is posted at Court of Appeals Review 12/1/05–1/30/06, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf.

Appeals Review, App. A-10. In the Fourth Circuit, where Victor Rita was sentenced, 100% of below-guideline sentences were reversed and 100% of within-guideline sentences were affirmed. In the Eighth Circuit, where Mario Claiborne was sentenced, 92.9% of below-guideline sentences were reversed and 98.8% of within-guideline sentences were affirmed. *Id.*, App. A-9.

The presumption circuits attempt to distinguish the post-*Booker* presumption of reasonableness from the presumptive guideline system held unconstitutional in *Booker* by claiming that it does not mean that a sentence *outside* the guideline range is presumptively *unreasonable*. *See, e.g., United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006); *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished). Statistical analysis of the decisions of presumption circuits belies that contention. Over 20% of outside-guideline sentences have been reversed, while less than 1% of within-guideline sentences have been reversed. *See* Court of Appeals Review, App. A-10. This is significantly different than the treatment of appeals of outside-guideline sentences in non-presumption circuits, where only 8.7% were reversed. *Id.*

Given the widespread view among the judiciary that the Guidelines do not comply with 18 U.S.C. § 3553(a), produce sentences that are too severe, and fail to allow individualized sentencing,[15] one would expect to see a very

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[15] *See* U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary ES-1-8 (Feb. 2003), available at http://www.ussc.gov/judsurv/judsurv.htm.

different trend were the law faithfully being followed. Instead, the pattern of appellate guideline enforcement and the periodic demands for a legislative fix, *see* nn. 7, 11-12 and accompanying text, *supra*, have "preserve[d] *de facto* mandatory Guidelines by discouraging district courts from sentencing [below] Guidelines ranges" and from following the sentencing law. *See Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part).

B. Multiple Standards of Appellate Review.

The presumption circuits employ differing standards of review depending on whether the appeal is from a sentence within, below, or above the guideline range. The differing standards have the effect of enforcing the guideline range as under pre-*Booker* law, but are far more permissive of above-guideline sentences than under pre-*Booker* law. This stands the parsimony requirement of § 3553(a) on its head,[16] is contrary to the command in *Booker* that one standard of review – for "unreasonableness" – be applied "across the board," *Booker*, 543 U.S. at 263, and "irrespective of whether the trial judge sentences within or outside the Guidelines range," *id.* at 260, and operates as the one-way lever this Court found to be incompatible with congressional intent, *id.* at 266.

When reviewing within-guideline sentences, the presumption circuits begin with the proposition that a within-guideline sentence incorporates the purposes of

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[16] "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a).

sentencing and all relevant factors set forth in § 3553(a). *See United States v. Cage*, 458 F.3d 537, 542-43 (6th Cir. 2006); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *accord United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 517-18 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005).[17] If the guideline range was calculated correctly, affirmance inexorably follows. *See, e.g., United States v. Davis*, 2006 WL 3267349, at *1 (4th Cir. Nov. 13, 2006) (unpublished); *United States v. Favorite*, 2006 WL 3231470, at *1 (5th Cir. Nov. 8, 2006) (unpublished); *United States v. Gonzalez*, 2006 WL 3375360, at *1 (7th Cir. Nov. 22, 2006) (unpublished); *United States v. Humphrey*, 2006 WL 3257883, at *2 (8th Cir. Nov. 13, 2006) (unpublished); *United States v. Lopez-Flores*, 444 F.3d 1218, 1222-23 (10th Cir. 2006).

Review of below-guideline sentences, however, is difficult to distinguish in substance from *de novo* review of downward departures as before *Booker*. In derogation of § 3553(a)'s express command that the district court "shall consider" the history and characteristics of the defendant and the circumstances of the offense in determining what

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[17] The D.C. Circuit has merely said that it adopts a presumption of reasonableness as its sister circuits have done. *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir.), *cert. denied*, 2006 WL 3037643 (U.S. Nov. 27, 2006).

"particular sentence" is sufficient but not greater than necessary to satisfy the purposes of sentencing, presumption circuits preclude or strongly discourage consideration of such factors based on the *Guidelines Manual*'s policy statements. *See, e.g., United States v. Simmons*, ___F.3d ____, 2006 WL 3365654, at *14-15 (5th Cir. Nov. 21, 2006) (cautioning in its "supervisory capacity as well as to assist the district court on remand," that while the sentencing court originally considered the age of the defendant, it should be aware of the Guidelines policy statement that age "is not ordinarily relevant" and must be prepared to "explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should *not* apply") (emphasis in original); *United States v. Duhon*, 440 F.3d 711, 716-17 & n.4 (5th Cir. 2006) (below-guideline sentence unreasonable because it "deviates from a relevant advisory Guideline disallowing probation" and so "varies, not only from the applicable guideline range, but also from the 'kinds of sentence' available under the Guidelines"; it "diverges from a policy statement prohibiting the consideration of physical condition"; and it "should have similarly addressed the policy statement discouraging [family circumstances] as a ground for departure"); *United States v. Hodge*, ___ F.3d ____, 2006 WL 3373113, at *5 (8th Cir. Nov. 22, 2006) (drug addiction is an "improper or irrelevant" factor because it is prohibited by U.S.S.G. § 5H1.4, p.s.); *United States v. Beal*, 463 F.3d 834, 837 (8th Cir. 2006) (variance from career offender guideline based on the fact defendant had never served any jail time was error because U.S.S.G. § 4A1.3, p.s., prohibits more

than one point off a career offender sentence); *United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (vacating sentence based on defendant's role as sole caretaker for two young children because a departure for family ties and responsibilities would not have been allowed under the Guidelines).

Moreover, the presumption circuits sometimes directly substitute their own judgment for that of sentencing judges, ordering specific sentences to be imposed on remand. *See, e.g., United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) ("remand[ing] for resentencing at the low end of the sentencing range (seventy-eight months) on Count Two and to a consecutive sixty-month sentence on Count Three"), *petition for cert. filed* June 20, 2006 (No. 05-11659) ; *United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (remanding for "a determination of the drug quantity under a preponderance of the evidence standard" and "for the imposition of a sentence commensurate with the drug quantity determination").

When reviewing below-guideline sentences, presumption circuits consistently require a more compelling reason the further a below-guideline sentence "varies," "diverges," or "deviates" from the guideline range. *See, e.g., Claiborne*, 439 F.3d at 481; *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished); *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *Cage*, 451 F.3d at 594-95; *Duhon*, 440 F.3d at 715; *United States v. Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005), *cert. denied*, 2006 WL 985745 (U.S. Apr. 17, 2006); *United States v. Dean*, 414 F.3d 725,

729 (7th Cir. 2005). This standard requires sentences that are closely tethered to the guideline range but bear no relation to the purposes of sentencing applied with parsimony.

In sharp contrast is the perfunctory review applied by presumption courts to above-guideline sentences. Sentences that admittedly create unwarranted disparity and overstate the seriousness of the offense, and would be reversed if below the guideline range, are left undisturbed. *See, e.g.*, *United States v. Reinhart*, 442 F.3d 857, 864 (5th Cir.) (concluding sentence 84 months above top of guideline range was reasonable though sentencing court "did not consider the need to avoid unwarranted sentence disparities among similarly-situated defendants . . . [and defendant's] sentence is undoubtedly longer than that received by other similar defendants"), *cert. denied*, 127 S. Ct. 131 (2006); *United States v. Saldana*, 427 F.3d 298, 316 (5th Cir.) ("[g]iven the deference we owe to the district court, we will not overturn the extent of the [400%] upward departure here as unreasonable" though it "overstates the harm done to the victims" and "is significantly longer than those imposed in similar 'tax protestor' cases"), *cert. denied*, 126 S. Ct. 810 (2005); *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006) (affirming 300% increase above guideline range based on factors already taken into account by the criminal history rules because a "defendant's criminal history is one of the factors that a court may consider in imposing a non-Guideline sentence" and rejecting defendant's argument that the sentence was unreasonable because of unwarranted disparity).

As Judge Bye of the Eighth Circuit observed: "In this [above-Guideline] case, the district court only perfunctorily indicated it had 'considered' the § 3553(a) factors. If we pretend, for a moment, this case were one in which the Guidelines called for a sentence of twenty-four months at the low end of the advisory range, and the district court had departed *downward* 400% to six months, with the same spare comments about consideration of the § 3553(a) factors, I seriously doubt the district court's decision would have survived our appellate review." *United States v. Zeigler*, 463 F.3d 814, 820-21 (8th Cir. 2006) (Bye, J., concurring) (emphasis in original).

The Seventh Circuit has issued a warning to defendants that appeals of within- and above-guideline sentences are "frivolous." *United States v. Bullion*, 466 F.3d 574, 575 (7th Cir. 2006) (defendant's appeal of 264-month sentence, which was 39 months above top end of the guideline range, was "frivolous," and "[t]here was no basis for the defendant's challenging the exercise of discretion by the sentencing judge in this case – and, we add in cases like it"); *United States v. Gonzalez*, 462 F.3d 754, 755 (7th Cir. 2006) (asking defendants not to "confuse a debatable sentence with an unreasonable one and . . . waste their time and ours by filing frivolous appeals"). No such warning has been issued to the government regarding below-guideline sentences. Instead, the Seventh Circuit carefully scrutinizes and frequently reverses those sentences. *See, e.g., United States v. Wallace*, 458 F.3d 606, 612-14 (7th Cir. 2006); *United States v. Pisman*, 443 F.3d 912, 920 (7th Cir.), *cert. denied*, 127 S. Ct. 413 (2006).

In addition, some presumption circuits have produced two different statements of the law depending on whether the sentence was above or below the guideline range. Affirming an *above*-guideline sentence, the Eighth Circuit rejected the argument "that the range of reasonableness is essentially co-extensive with the Guidelines range" because such a rule "would effectively render the Guidelines mandatory." *United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005). Later, reversing a *below*-Guideline sentence, the Eighth Circuit concluded that the Guidelines are presumptively reasonable because they "are fashioned taking the other [18 U.S.C.] § 3553(a) factors into account and are the product of years of careful study." *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). The Fifth Circuit, too, uses remarkably different language to describe its review depending on whether the sentence was above or below the guideline range. *Compare Reinhart*, 442 F.3d at 864 (affirming above-guideline sentence because the "guidelines are merely one sentencing factor among many," and "we therefore decline to give the guidelines the quasi-mandatory status urged by Reinhart") *with Duhon*, 440 F.3d at 717-21 (reversing below-guideline sentence because district court improperly relied on factors prohibited and discouraged by the Guidelines' policy statements "without explaining its deviation").

The data and case review above demonstrate that according a presumption of reasonableness to within-guideline sentences has the effect of subjecting below-guideline sentences to strict scrutiny tied to the Guidelines' range and policy statements, as under the standard of

review for departures excised in *Booker*. In contrast, within-guideline sentences are nearly automatically affirmed. This is inconsistent with the unitary standard of review that *Booker* requires.

III. THE GUIDELINE RANGE IS UNWORTHY OF A PRESUMPTION OF REASONABLENESS BECAUSE, UNDER THE GUIDELINES' RELEVANT CONDUCT RULES AND PROCEDURAL ADVICE, THE GUIDELINE RANGE FREQUENTLY RESTS ON AN UNRELIABLE FACTUAL BASIS.

As experience makes plain, guideline calculations are often the product of unreliable, untested and unwarranted factual assumptions. This happens because the Guidelines require the use of a broad sweep of information to calculate the sentencing range without adequate procedural protections. The use of factually unreliable information to compute sentencing ranges is a constant risk and common occurrence. Such calculations are not worthy of a presumption of reasonableness.

Under U.S.S.G. § 1B1.3, applicable to the majority of cases sentenced in federal court today, and a host of cross-references like that applied in Victor Rita's case, the Guidelines require that uncharged, dismissed and acquitted offenses, often far afield of the offense of conviction, be used to calculate the guideline range.[18] That calculation is

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[18] *See, e.g., United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double

to be based on a preponderance of the "probably accurate" information, including hearsay. U.S.S.G. § 6A1.3, p.s. & comment (backg'd.). Seven courts of appeals attribute a presumption of reasonableness to the range thus "correctly calculated." *See, e.g., United States v. Romero*, ___ F.3d ____, 2006 WL 3530656, at *6, *9 (7th Cir. Dec. 8, 2006); *United States v. Smith*, 2006 WL 3068667, at *1 (5th Cir. Oct. 26, 2006) (unpublished); *United States v. Minter*, 2006 WL 3018109, at *1 (4th Cir. Oct. 23, 2006) (unpublished).

All courts of appeals have approved the use of uncharged, dismissed and acquitted separate offenses when determining the guideline range.[19] Most have held that in

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homicide to which firearms were unrelated); *United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006) (affirming sentence for defendant convicted of distribution of cocaine based on distribution of ecstasy and firearms offense of which he was acquitted); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated).

[19] *See, e.g., United States v. Andreano*, 417 F.3d 967, 970 (8th Cir. 2005); *United States v. Fanfan*, 468 F.3d 7, 15 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2006); *United States v. Clark*, 179 Fed. Appx. 870, 871-72 (3d Cir. 2006); *United States v. Stewart*, 185 Fed. Appx. 276, 279 (4th Cir. 2006); *United States v. Angleton*, 2006 WL 2828657, at *1, *4 (5th Cir. Sept. 28,

doing so, a preponderance of the evidence standard may be used. At least one has held that a preponderance of the evidence standard *must* be used. *See United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (vacating sentence based on drug quantity found by the jury beyond a reasonable doubt and remanding "for a determination of the drug quantity under a preponderance of the evidence standard and for the imposition of a sentence commensurate with the drug quantity determination"). Before and after *Booker*, hearsay may be used at sentencing,[20] and several courts of appeals treat the mere inclusion of allegations in a presentence report as evidence that may be used in calculating the guideline range unless the defendant comes forward with evidence to rebut the hearsay.[21]

2006) (unpublished); *United States v. Barevich*, 443 F.3d 956, 958-59 (7th Cir. 2006); *United States v. Flores-Flores*, 2006 WL 2269879, at *1 (9th Cir. Aug. 2, 2006) (unpublished); *United States v. Magallenez*, 408 F.3d 672, 678-79 (10th Cir. 2006); *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006).

[20] *See United States v. Littlesun*, 444 F.3d 1196, 1198-1200 (9th Cir. (2006); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005).

[21] *See United States v. Caldwell*, 448 F.3d 287, 290-91 (5th Cir. 2006); *United States v. Daniel*, 178 Fed. Appx. 345, 346 (5th Cir. 2006); *United States v. Bobadilla-Diaz*, 176 Fed. Appx. 858, 859 (9th Cir. 2006); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997);

These guideline-endorsed procedures and applications produce calculations that are routinely based on estimation and surmise rather than evidence. *See, e.g.*, *United States v. Jackson*, ___ F.3d ____, 2006 3436038, at *3, *9 (6th Cir. Nov. 30, 2006) (upholding as "reasonable" drug quantity "estimate" based on weighing four of eighteen pieces of crack cocaine); *United States v. Perez*, 183 Fed. Appx. 477, 479-80 (5th Cir. 2006) (upholding as "reasonable" probation officer's "extrapolation" of drug quantity by multiplying quantity of marijuana seized by number of times defendant crossed border).

And the information comes from untrustworthy and unchallengeable sources. As a typical example, a defendant pled guilty in the Northern District of Texas to conspiring to import more than 5 kilograms of cocaine and more than 1000 kilograms of marijuana. The presentence report, restating hearsay provided by the government, said the defendant was accountable for 155 kilograms of cocaine and 19,282 pounds of marijuana. *See* Brief of Appellant, *United States v. Murietta-Maldonodo*, 111 Fed. Appx. 253 (5th Cir. 2004) (No. 04-10177), available at 2004 WL 2966797, at *4. At the sentencing hearing, an agent testified that he was told the defendant "had a connection in California who supplied him with 25 kilograms of cocaine," admitted that he had no means of verifying the information and "that's as far as we went with it." *Id.* at *8-*9. The agent also testified that a cooperating witness had attributed 21 van loads of

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United States v. Terry, 916 F.2d 157, 160-62 (4th Cir. 1990).

marijuana to the defendant, and that another source, whose identity the agent would not disclose, had attributed another 10 to 20 van loads to the defendant. *Id.* at *5-*6.

Before *Booker*, the Fifth Circuit rejected the defendant's argument that the full quantity alleged in the presentence report used to sentence him to 327 months in prison was not supported even by a preponderance of reliable evidence, holding that the *defendant* "has not shown that the information in the Presentence Report (PSR) concerning the drug quantities involved in the offense was 'materially untrue, inaccurate, or unreliable.'" *United States v. Murietta-Maldonado*, 111 Fed. Appx. 253, 254 (5th Cir. 2004) (internal citations omitted). After *Booker*, the same sentence was held to be reasonable because when a judge "impose[s] a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Murietta-Maldonado*, 161 Fed. Appx. 374, 375 (5th Cir. 2006) (internal citations omitted).[22]

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[22] *See also United States v. Taylor*, 184 Fed. Appx. 870 (11th Cir.) (affirming life sentence based on uncharged murder over defendant's objections to the use of hearsay and a preponderance of the evidence standard), *cert. denied*, 127 S. Ct. 311 (2006); *United States v. Patterson*, 2006 WL 2620174 (4th Cir. Sept. 13, 2006) (unpublished) (affirming 262-month sentence under cross-reference to first degree murder guideline for defendant convicted of conspiracy to possess crack with intent to distribute, based on finding by a preponderance that the defendant participated in a home invasion which resulted in death, though the jury acquitted him of participating in a firearms conspiracy factually based on the home

Such reasoning turns a blind eye to the traditional view that untested statements by self-interested witnesses are inherently unreliable. Recently a district judge took aim at this problem. In overturning the convictions of a mother and her sons obtained through false and collusive "snitch testimony," Judge Melancon found that the use of such testimony is "systemic," and called upon the Department of Justice to conduct an independent investigation into the problem. *See United States v. Colomb*, No. 02-CR-60015, Order Ruling on Defendant's Motion for New Trial (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531; *see also United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("In truth, [the] 'real conduct' . . . system relies on 'findings' that rest on a mishmash of data, including blatantly self-serving hearsay largely served up by the Department [of Justice].") (internal quotation marks and citations omitted). The Sentencing Commission itself has recognized the unreliability of the information often used to establish relevant conduct and the hidden disparity it creates. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50 (Nov. 2004) ("research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators"), available at http://www.ussc.gov/15_year/15year.htm.

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invasion).

A presumption of reasonableness at least dissuades and at worst prohibits sentencing judges from blunting the impact of unreliable information on the ultimate sentence. *See United States v. Thorpe*, 447 F.3d 565, 567-68 (8th Cir. 2006) (district court erred by imposing sentence based on drug quantity found by the jury because of its discomfort with the severity of controlled substance laws and how little the government must prove in conspiracy cases). The presumption creates yet another system, like those struck down in *Blakely* and *Booker*, in which the equivalent of conviction is obtained absent the fundamental components of the adversary system the Framers intended. *See Blakely v. Washington*, 542 U.S.296, 305-08, 311-13 (2004); *United States v. Booker*, 543 U.S. 220, 230-44 (2005); *id.* at 273 (Stevens, dissenting in part); *id.* at 304 (Scalia, J., dissenting in part); *id.* at 319 n.6 (Thomas, J., dissenting in part); *see also Washington v. Recuenco*, ___ U.S. ____, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) ("In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments.").

Without procedures sufficient to assure the reliability of the wide range of information a sentencing judge must consider in calculating the guideline range, a presumption of reasonableness is unwarranted and at odds with the holdings in *Blakely* and *Booker*.

CONCLUSION

According a presumption of reasonableness to within-Guideline sentences is inconsistent with *Booker* and the judgments of the courts of appeals in both No. 06-5618 and No. 06-5754 should be reversed.

Respectfully submitted,

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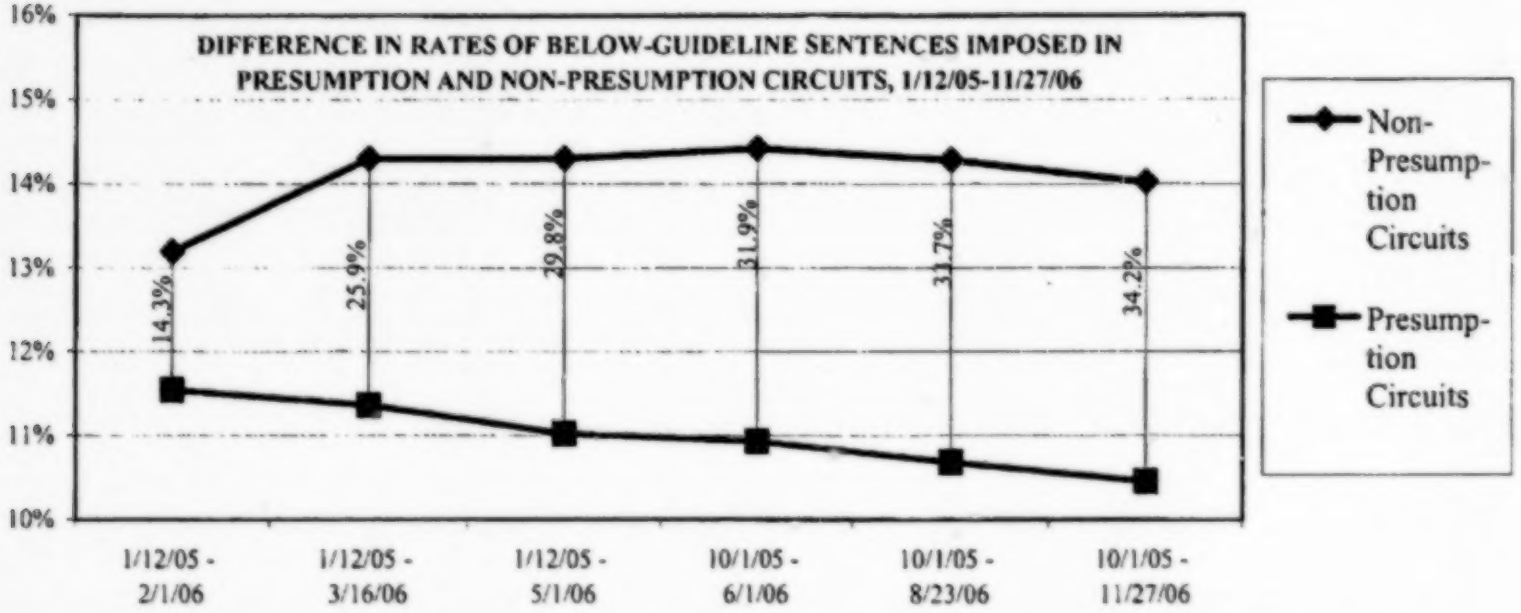
APPENDIX



The data used to prepare this chart was taken from the following reports: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm. The lower line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had adopted a presumption of reasonableness before or during the respective period. The upper line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had not adopted a presumption of reasonableness before or during the respective time period. The percentage shown on the vertical line at each time period is the percentage by which the rate of below-guideline sentences for the circuits that had not adopted a presumption exceeded the rate of below-guideline sentences for the circuits that had adopted a presumption. The seven circuits to adopt a presumption did so in the following cases: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

BELOW GUIDELINE SENTENCES IMPOSED/CASES SENTENCED 1/12/2005-11/27/2006

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348

Source: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm.

Presumption adopted shown in bold: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

DATA POINTS

Period	Non-Presumption Circuits	Presumption Circuits	Difference Between Presumption and Non-Presumption
1/12/05 - 2/1/06	13.2%	11.5%	14.3%
1/12/05 - 3/16/06	14.3%	11.4%	25.9%
1/12/05 - 5/1/06	14.3%	11.0%	29.8%
10/1/05 - 6/1/06	14.4%	10.9%	31.9%
10/1/05 - 8/23/06	14.3%	10.7%	33.7%
10/1/05 - 11/27/06	14.0%	10.5%	34.2%

RATES OF BELOW-GUIDELINE SENTENCES IMPOSED 1/12/05-11/27/06 - DATA

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Pre-sumption Circuits	Pre-sumption %	Non-Pre-sumption Circuits	Non-Pre-sumption %	Nat'l %
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607	3107	11.54	4844	13.19	12.50
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873	26915		36716		
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733	4984	11.36	4344	14.30	12.56
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044	43861		30384		
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827	5526	11.02	5065	14.30	12.38
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098	50151		35417		
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360	2569	10.93	2308	14.42	12.34
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669	23506		16002		
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454	3152	10.68	2862	14.28	12.13
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649	29513		20047		
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632	4197	10.45	3738	14.02	11.88
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348	40145		26657		

COURT OF APPEALS REVIEW

12/1/05-11/30/06

The following analysis covers the period December 1, 2005 through November 30, 2006. It includes published and unpublished decisions in the Westlaw database responsive to the following search: "SENTENCING GUIDELINES" & DA(AFT 11/30/2005 & BEF 12/1/2006) & (REASONABLE! UNREASONABLE! 3553(A) ADVISORY). It includes only cases in which either the government or the defendant appealed the sentence on the basis of it being unreasonable under 18 U.S.C. § 3553(a) (including appeals on the basis that the district court failed adequately to articulate reasons for the sentence imposed), or in which the court of appeals addressed the reasonableness of the sentence *sua sponte*.

Parameters were established to ensure consistency. Appeals based solely on a claimed error in calculating the guideline range or clear error in fact-finding in support of the guideline range were not included (even if a party or the court said that for that reason, the sentence was unreasonable). Appeals of a grant, denial or extent of a departure described in the Guidelines Manual were included. Cases in which 18 U.S.C. § 3553(a) played no role because a mandatory minimum statute dictated the sentence were not included. Cases involving sentences imposed before *Booker* was decided were not included unless the court of appeals determined not only whether there was *Booker* error (including plain error), but whether

the sentence was reasonable. Fines, terms of supervised release, and sentences for supervised release and probation violations that met the above parameters were included.

Each case meeting the above parameters was coded according to whether the sentence imposed was within, above or below the guideline range, the party who appealed, and the result of the appeal. Multi-defendant cases were counted for each sentence meeting the above parameters, as were cases in which a defendant had more than one type of sentence meeting the above parameters (*e.g.*, a within-guideline prison term for the instant offense and an above-guideline prison term for revocation of supervised release or probation that had been imposed for a prior offense). The categories are:

1. Within-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

2. Within-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

3. Above-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

4. Above-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

5. Below-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

6. Below-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

Of the 1,534 sentences identified through the above search parameters, 1,049 were appeals from within-guideline sentences, 254 were appeals from above-guideline sentences, and 231 were appeals from below-guideline sentences. The following charts compare the information obtained from a review of those cases. A document that includes the charts below and the entire list of cases is posted at:

www.fd.org/CourtofAppealsReview12.1.05-11.30.06.

NATIONAL RESULTS

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	1034 / 1049 (98.6 %)	15 / 1049 (1.4 %)	Within Guideline	0/0	0/0
Above Guideline	245 / 254 (96.5 %)	9 / 254 (3.5 %)	Above Guideline	0/0	0/0
Below Guideline	146 / 148 (98.6 %)	2 / 148 (1.4 %)	Below Guideline	18 / 83 (21.7 %)	65 / 83 (78.3 %)

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	197 / 197 (100 %)	0 / 197 (0 %)	Within Guideline	0/0	0/0
Above Guideline	23 / 25 (92 %)	2 / 25 (8 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	0 / 11 (0 %)	11 / 11 (100 %)

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	84 / 85 (98.8 %)	1 / 85 (1.2 %)	Within Guideline	0/0	0/0
Above Guideline	30 / 31 (96.8 %)	1 / 31 (3.2 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	2 / 28 (7.1 %)	26 / 28 (92.9 %)

COMPARISON OF CIRCUITS WITH AND WITHOUT A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINE SENTENCES

1. RATIO OF REVERSALS FOR WITHIN- AND OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only[1]	Presumption Circuits Only[2]
Within Guideline Sentences	15 / 1049 reversed (1.4 %)	9 / 372 reversed (2.4 %)	6 / 677 reversed (0.9%)
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	18 / 206 reversed (8.7 %)	58 / 279 reversed (20.8 %)

2. RATIO OF REVERSALS FOR GOVERNMENT APPEALS OF BELOW- GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only	Presumption Circuits Only
Sentence Affirmed	18 / 83 (21.7 %)	10 / 25 (40 %)	8 / 58 (13.8 %)
Sentence Reversed	65 / 83 (78.3 %)	15 / 25 (60 %)	50 / 58 (86.2 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	2	0	Within Guideline	0	0
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	23	0	Within Guideline	0	0
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

SECOND CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	38	1	Within Guideline	0	0
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	60	2	Within Guideline	0	0
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	197	0	Within Guideline	0	0
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	62	0	Within Guideline	0	0
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	87	1	Within Guideline	0	0
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	169	1	Within Guideline	0	0
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	84	1	Within Guideline	0	0
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

NINTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	72	6	Within Guideline	0	0
Above Guideline	24	1	Above Guideline	0	0
Below Guideline	20	1	Below Guideline	4	2

TENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	70	3	Within Guideline	0	0
Above Guideline	9	0	Above Guideline	0	0
Below Guideline	11	0	Below Guideline	0	1

ELEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Within Guideline	170	0	Within Guideline	0	0
Above Guideline	47	0	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	5	6

END NOTES

1. The First, Second, Third, Ninth, and Eleventh Circuits have not adopted a presumption of reasonableness for within-guideline sentences.

2. The District of Columbia and the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted a presumption of reasonableness for within-guideline sentences.

083 B

Nos. 06-5618 & 06-5754

IN THE
Supreme Court of the United States

MARIO CLAIBORNE,
Petitioner,

v.

UNITED STATES,
Respondent.

VICTOR A. RITA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth and Fourth Circuits

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BRIEF OF LAW PROFESSORS WHO STUDY SENTENCING REFORM AS *AMICI CURIAE* IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF *AMICI CURIAE*[*]

Amicus curiae are a group of law professors who teach, study and write about sentencing reform and have closely followed the operation of the Federal Sentencing Guidelines in lower courts both before and after this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Among the group are law professors who are co-authors of the leading casebook in the field of sentencing, *Sentencing Law & Policy* (Aspen 2004), and who are editors of and contributors to the leading law journal in the field of sentencing, the *Federal Sentencing Reporter*. Collectively, the professors in this group have written more than 100 articles and commentaries about federal sentencing reform.

The group is comprised of: Professor Douglas A. Berman, the William B. Saxbe Designated Professor of Law at the Moritz College of Law at The Ohio State University; Professor Margareth Etienne, Assistant Professor of Law, University of Illinois College of Law; Professor Marc Miller, Ralph W. Bilby Professor of Law, Rogers College of Law at the University of Arizona; Professor Michael M. O'Hear, Associate Professor of Law at Marquette University Law School; Professor Mark Osler, Professor of Law, Baylor Law School; Dean David N. Yellen, Dean and Professor of Law at Loyola University Chicago School of Law.

Amici offer this brief to highlight sentencing reform principles they believe can help inform the Court's resolution of these cases.

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[*] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A set of long-standing federal sentencing principles should inform the Court's resolution of these cases. These are principles that find expression in the writings of Judge Marvin Frankel and Professor Norval Morris, two leading advocates of reform proposals that resulted in the Sentencing Reform Act of 1984. These are principles that animate provisions of the Sentencing Reform Act of 1984 and the PROTECT Act of 2003, especially the detailed sentencing instructions Congress has set forth in 18 U.S.C. § 3553. These are principles that have been emphasized by this Court in rulings from *Mistretta v. United States*, 488 U.S. 361 (1989), to *Koon v. United States*, 518 U.S. 81 (1996), to *United States v. Booker*, 543 U.S. 220 (2005).

These principles recognize the critical importance of judicial sentencing discretion and suggest the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

ARGUMENT

> "It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion."
>
> — MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 124 (1972)

> "The judge is an inevitably appropriate sentencing figure in the drama of crime and punishment ... [and] it should increasingly be required that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review. Principled sentencing lies at the heart of an effective criminal justice system. It is obvious that sentencing involves a heavy

> responsibility and raises issues of difficulty; it thus requires reasons given, critical public consideration of those reasons, critical appellate review of those reasons."
>
> **— Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 275-76 (1977)**

I. PRINCIPLES FOR FEDERAL SENTENCING

In *Mistretta v. United States*, this Court emphasized the "uniquely judicial subject of sentencing," and explained why all sentencing decision-making "lies so close to the heart of the judicial function." 488 U.S. at 408. In *Koon v. United States*, this Court stressed that it "has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 518 U.S. at 113. A related point drew consensus in *United States v. Booker*: "everyone agrees that the constitutional issues presented by [judicial fact-finding at sentencing] would have been avoided entirely" if the Guidelines were not binding because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233.

Mistretta, *Koon*, and *Booker* all spotlight that a constitutionally sound and practically sensible sentencing system is one in which the Federal Sentencing Guidelines enhance, rather than encumber, the judicial exercise of reasoned judgment at sentencing. And the text Congress set forth in 18 U.S.C. § 3553(a) details how the Guidelines should help inform, and not restrict, the assessment of "every convicted person as an individual and every case as a unique study in ... human failings." *Koon*, 518 U.S. at 113; *cf. United States v. Buchanan*, 449 F.3d 731, 741 (6th Cir. 2006)

(Sutton, J., concurring) (stressing that, after *Booker*, district courts "retain the ultimate authority within reason to apply the § 3553(a) factors to each criminal defendant.... The end is not process in itself but the substantive goal that trial judges exercise independent and deliberative judgment about each sentence—making these sentences more than an algebraic equation and less than a Rorschach test.").

This Court needs to ensure that circuit courts incorporate these long-standing federal sentencing principles into the application of reasonableness review after *Booker*. Lower courts should view and apply the Federal Sentencing Guidelines as helpful (but sometimes flawed) advice that can aid sentencing judges when exercising reasoned judgment in light of case-specific realities and broader norms. Unfortunately, despite the instructive statutory text of § 3553(a) and this Court's work in *Koon* and *Booker*, many circuit courts apparently believe the Guidelines should confine, rather than contribute to, the exercise of reasoned judgment at sentencing. The Court should use these cases to correct any approach to reasonableness review that, by thwarting the thoughtful exercise of reasoned judgment by district courts at sentencing, is constitutionally suspect and generally unwise.

A. The Virtues and Vices of Judicial Sentencing Discretion

1. Virtues of individualized and reasoned justice

A decade ago, this Court's unanimous *Koon* decision emphasized the importance of ensuring that district judges retain sufficient discretion under the Sentencing Reform Act of 1984 ("SRA") to impose individualized and reasoned sentences. *Koon* was an interpretation of the provisions of the SRA, and this Court highlighted that Congress in the SRA recognized "the wisdom, even the necessity, of sentencing procedures that take into account individual

circumstances." *Koon*, 518 U.S. at 92 (citing 28 U.S.C. § 991(b)(1)(B), which mandates that the Sentencing Commission create guidelines that "maintain[] sufficient flexibility to permit individualized sentences"). The *Koon* ruling stressed what the Sentencing Commission has always recognized: "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." *Id.* at 93 (quoting U.S. SENTENCING GUIDELINE MANUAL, Ch. 1, pt. A (1995)). Consequently, *Koon* set out an approach to departures and appellate review specifically designed to effectuate Congress's "intent that district courts retain much of their traditional sentencing discretion." *Id.* at 97.

In *Booker*, the importance of judicial sentencing discretion took on a constitutional dimension. The remedy in *Booker* preserved a place for judicial fact-finding within a guideline scheme by declaring the Guidelines "effectively advisory" (which necessarily must afford district judges even more sentencing discretion than they possessed under the SRA). The *Booker* Court's endorsement of judicial fact-finding in an advisory guideline system, while finding constitutional problems with such fact-finding in a binding system, is justified by the traditional understanding of sentencing as a distinctive enterprise involving the exercise of reasoned judgment. The *Booker* decision recognizes and safeguards an important constitutional distinction between (1) finding facts that increase a sentencing range set by a legislature or sentencing commission (a task for juries), and (2) exercising judgment based on the consideration of relevant sentencing factors (a task for judges). *See generally* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 406-14 (2006) (elaborating on these points).

In short, the *Booker* merits opinion stands for the constitutional principle that sentencing judges can consider a range of facts at sentencing when judicial fact-finding done in service to reasoned judgment. And the *Booker* remedial

opinion explains that, with the Guidelines "effectively advisory," federal judges are required "to take account of the Guidelines together with other sentencing goals" Congress set forth in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259. *Booker* thus now requires judges to exercise reasoned sentencing judgment by filtering the Guidelines' advice through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a).

After *Booker*, federal judges may no longer simply find Guideline-specified facts, plug these facts into a calculation, and then just follow the Guidelines' predetermined sentencing outcomes. As stressed in *Booker*, § 3553(a) instructs a judge to consider "the need to avoid unwarranted sentencing disparities" and the need for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 259-60 (quoting 18 U.S.C. § 3553(a)). Moreover, the central directive of § 3553(a) commands federal judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment while considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). Consequently, federal judges must now integrate and assimilate the facts emphasized by the Guidelines with the broader judgment-oriented considerations Congress set out in § 3553(a). In this way, *Booker* ensures that federal sentencing decision-making remains, in the words of the *Mistretta* decision, "close to the heart of the judicial function." 488 U.S. at 408.

2. Vices of unexplained (and perhaps unjustifiable) decisions by judges

As long recognized by Congress and this Court, district judges must possess a certain measure of case-specific

discretion to render individualized and reasoned sentencing justice. But unregulated and unreviewed discretion can permit (and shield from view) reason*less* sentencing decisions. Indeterminate federal sentencing practices suffered not simply from too much judicial discretion, but rather from a paucity of express principles, reasoning and accountability in the sentencing process. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-49 (1972) (lamenting "Law without Order or Limit" in Chapter 1 and "Walls of Silence" in Chapter 4); Senator Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977) (assailing disparity in the federal system before the SRA, but stressing that this "disparity cannot be traced to 'weak' judges": the "legislature ... must bear the blame" because Congress had not "built any standards or safeguards into the sentencing process").

Judge Frankel and Professor Morris advocated bringing reasoned law to sentencing through the development of principled rules and the review of the discretion exercised by sentencing judges. They stressed that judges should have to give reasons for their sentences and these reasons should be subject to scrutiny on appeal. By requiring reasoned and reviewable sentencing decisions, lawmakers could help ensure that each sentence would be imposed, in Judge Frankel's words, with "the maximum we can muster of rational thought, humanity, and compassion." FRANKEL, *supra*, at 124. Successful reforms not only bring more formal rules to sentencing, but also make decisions more reasoned, transparent, and open to appropriate scrutiny. *See generally* American Law Institute, *Model Penal Code: Sentencing*, Council Draft No. 1, § 102(2) (Sept. 27, 2006) (urging rules that preserve judicial discretion to individualize sentences "within a framework of law" and increase the transparency of sentencing decisions); The Constitution Project, *Principles for the Design and Reform of Sentencing*

Systems: A Background Report 16-18 (2006) (praising sentencing systems that, while retaining flexibility, guide decisions with legal principles and enhance transparency).

Congress in the SRA championed principled and transparent sentencing rules and the importance of requiring and reviewing reasons for the sentences that judges decide to impose. The SRA emphasizes four central sentencing purposes in 18 U.S.C. § 3553(a)(2) and throughout the rest of the Act. Notably, the primary statement of sentencing purposes appears in the SRA's instructions *to judges* concerning the "factors to be considered in imposing a sentence," *id.* § 3553(a), and the same statutory provision directs that a district court, "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." *Id.* § 3553(c). The Senate Report discussing these provisions stresses that Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260. Of course, the original SRA also provided broad grounds for appellate sentencing review by both prosecutors and defendants, and Congress only a few years ago amended these appellate review provisions to make them more effective. *See* 18 U.S.C. § 3742; *see also* discussion of PROTECT Act, *infra*.

As evidenced by Congress's passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), even a complex sentencing structure can be refined to ensure the exercise of discretion is reasoned, transparent, and open to appropriate scrutiny. The PROTECT Act did not reject the long-standing principle that district judges must have sufficient sentencing discretion to impose individualized sentences. *See United States v. VanLeer*, 270 F. Supp. 2d 1318, 1319-26 (D. Utah 2003) (Cassell, J.) (stressing that PROTECT Act did not impact district courts' sentencing

discretion in most cases). Rather, the enacted provisions of the PROTECT Act reveal that Congress's chief concern was federal sentencing discretion hidden from appropriate and effective review. *See id.* at 1320-25 (detailing procedural focus of the PROTECT Act); *see also* William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43, 43 (2003) (stressing that PROTECT Act was "intended to improve the collection and sharing of sentencing data among Congress, the courts, the Sentencing Commission, and the Justice Department"); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358, 366-69, 373 (2004) (explaining that "transparency and the rule of law, not national uniformity, [are] overarching purpose of the Guidelines system" and that the PROTECT Act's "most notable features of ... can be explained by reference to this objective" of enhancing transparency).[1]

Booker's revision to the operation of the Federal Sentencing Guidelines furthers the goal subjecting sentencing discretion to principled regulation and reasoned review. Rather than either sentencing-by-the-numbers or sentencing-by-the-seat-of-the-pants, *Booker* calls upon district courts,

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[1] Numerous provisions of the PROTECT Act reveal that this legislation was principally about making the exercise of discretion within the federal sentencing system more transparent and subject to effective review. *See* PROTECT Act, Pub. L. No. 108-21, § 401(c), 117 Stat. 650, 670 (requiring district judges to state departure reasons "with specificity in the written order of judgment and commitment"); *id.* § 401(m) (ordering the U.S. Sentencing Commission to produce a report on departures); *id.* § 401(*l*) (ordering the U.S. Attorney General to create new procedures for appealing departures); *id.* § 401(d) (providing for circuit courts to review departures more rigorously and with clearer standards); *id.* § 401(m)(2)(B) (creating a formalized and transparent framework for "early disposition" departures).

guided by the intricate directives set out by Congress in § 3553(a), to exercise independent reasoned judgment when imposing a sentence. Circuit courts, in turn, must ensure sentences are both reasoned and reasonable by evaluating, in light of the directives of § 3553(a), district courts' explanations offered in support of their sentencing decisions. This Court should clarify that *Booker* calls for the Courts of Appeals to police the exercise of reasoned judgment at sentencing by declaring suspect any and all sentencing decisions that fail to address thoughtfully the congressional directives of § 3553(a).

B. The Virtues and Vices of Sentencing Guidelines

1. Virtues of system-wide rules as starting points

Judge Frankel and Professor Morris urged the creation of sentencing guidelines because they recognized that, by requiring the formulation of explicit sentencing rules, a guideline system would facilitate the development of reasoned and principled sentencing law and procedures.[1] Reformers called for legislatures to set basic punishment goals and broad policy parameters—as it should within a democratic society—and then empower a specialized commission to work with judges to create more detailed system-wide sentencing rules. To borrow again the words of Norval Morris, a guideline system that engineered "the proper balance between legislative, administrative, and judicial discretion in sentencing," could help to "at last bring principle, coherence, predictability, and justice to sentencing criminal offenders." Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 285 (1977); *see also*

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[1] In the words of another early advocate of federal sentencing reform, sentencing guidelines were to provide a "way of introducing policy and purpose into what has largely been a normless sanctioning system." Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 368 (1989).

Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94-96 (1999) (discussing reformers' vision of a "sound institutional structure for addressing lawlessness in sentencing").

The Sentencing Reform Act of 1984 effectuated these goals by setting forth central principles and factors for district judges to consider in 18 U.S.C. § 3553(a) and also by creating the U.S. Sentencing Commission to develop detailed sentencing guidelines. As this Court recognized in *Mistretta*, Congress in the SRA set the essential parameters for a guideline system and then tasked the Commission with developing more intricate sentencing rules. *See Mistretta*, 488 U.S. at 374-79. The text of 18 U.S.C. § 3553(a) requires district courts to "consider" the Guidelines and policy statements issued by the Sentencing Commission, but it also requires district courts to consider other case-specific and purpose-oriented considerations. As mentioned before, through the statutory structure of § 3553(a), Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260.

Even after *Booker*, the Federal Sentencing Guidelines can, should, and inevitably will continue to play a major role in the federal sentencing process. No matter what this Court rules in these cases, probation officers will continue preparing presentence reports that still focus heavily on those sentencing factors—offense harms and criminal history—emphasized in the Guidelines. Moreover, examination and debate over Guideline issues can help ensure that district judges carefully examine the factual and legal issues raised in each case and should help ensure district judges never forget that every case is "a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime." *Koon*, 518 U.S. at 113. Guideline calculations often will provide a

useful starting point and framework for a sentencing judge and the parties to sort through the often complicated (and sometimes competing) facts and factors that arise in a particular case. Generally requiring basic Guideline calculations at the start of the sentencing process fosters a beneficial measure of procedural and substantive consistency: Guideline provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges across the nation.

2. Vices of unexplained (and perhaps unjustifiable) decisions by the Sentencing Commission

Though the Guidelines can and should aid the exercise of reasoned sentencing judgment, the Guidelines should not be elevated to an unjustified and unjustifiable sacrosanct status. After *Booker*, some lower courts appear to be clinging to the existing Guidelines like Linus clutching his security blanket. Disappointingly, circuit courts have not fully appreciated the importance of reasoned judgment at sentencing: they have insisted upon a Guideline-centric approach to post-*Booker* sentencing and continue to elevate some questionable Guideline diktats—such as whether DWI qualifies as a "violent felony" or whether loss was just less or more than $1,500,000—over reasoned and sound sentencing principles.[2]

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[2] Given the emphasis on objective variables and the need to reduce all sentencing factors to simple, round numbers, the Guidelines make innumerable arbitrary distinctions and focus excessively on precisely-quantifiable inputs. *See* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 251-52 (2005); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics, in A More Perfect System: Twenty-Five Years of Guideline Sentencing Reform*, 58 STAN. L. REV. 277 (2005). Some degree of artificial line-drawing is perhaps a necessary part of the guidelines-drafting process. But this reality underscores the need for judges to engage in thoughtful and reasoned decision-making on a case-by-case basis, so as to avoid the

Rather than attend to the statutory language requiring simply that the Guidelines be considered, the federal circuits have decreed that district judges must always calculate precise Guideline sentencing ranges and must still provide a detailed case-distinguishing justification for any deviation from the Guidelines. Many circuits have declared within-Guideline sentences "presumptively reasonable" and then have applied this presumption almost conclusively; even circuits formally rejecting such a presumption have affirmed nearly every within-Guideline sentence and have signaled that the Guidelines provide the safest of safe sentencing harbors for district courts. *See generally* Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Rita v. United States*, No. 06-5754 at Appendix (2006). Consequently, post-*Booker* circuit doctrines and practices encourage the sort of rote, mechanistic reliance on the Guidelines (with judicial fact-finding increasing sentencing ranges) that *Booker* found constitutionally problematic.

In addition to being constitutionally suspect, the circuit courts' presumption of reasonableness for within-Guideline sentences lacks a statutory foundation. Congress's nuanced sentencing instructions in § 3553(a) provide no textual basis for appellate courts to presume that all Guideline sentences are reasonable. In § 3553(a)'s detailed list of considerations, the Guidelines are just one factor among many—and not the first nor the most important one. The central command of § 3553(a) directs sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. When developing and revising the Guidelines, the U.S. Sentencing Commission has never explored—nor even formally addressed—whether the Guidelines serve this parsimony mandate. In fact, the

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unjust and arbitrary sentences that might otherwise result from a rigid application of inevitably crude categories.

Commission has stated that certain Guidelines—such as the disparately harsh crack sentence provisions, and the severe career-offender enhancement—undermine the sentencing goals set forth by Congress in § 3553(a)(2). A blanket presumption of reasonableness for all within-Guideline sentences ignores the Sentencing Commission's informed and express determination that some Guidelines do not produce just and effective sentences in many cases.

The principles expounded in *Booker* suggest that appellate courts should reverse their post-*Booker* approach of presuming within-Guideline sentences "reasonable" and requiring a justification for any variation. In light of *Booker*'s Sixth Amendment holding and the text of the SRA, circuit courts arguably should presume that within-Guideline sentences are suspect unless supported by an explanation of how the goals of § 3553(a) are served by following the Guidelines.

An appellate "presumption of unconstitutionality" for within-Guideline sentences would respect the merits opinion in *Booker* by ensuring that sentences are not the result of rote judicial fact-finding usurping the jury's role, and it would also force district judges to carefully evaluate all the § 3553(a) factors in each individual case rather than simply assume the Guidelines always achieve statutory goals. Even when a district court has decided that it should regularly follow the advice that appears in the Guidelines, it is still absolutely essential in each individual case "that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review." Morris, *supra*, at 274. As interpreted by this Court in *Booker*, both the Constitution and the Sentencing Reform Act demand this much.

II. A STATEMENT OF MODERN FEDERAL SENTENCING PRINCIPLES

Whatever this Court rules, these cases will, both formally and informally, represent a statement of modern federal sentencing principles. Consequently, we urge this Court to emphasize the importance of a sentencing process that requires judges, in compliance with the directives of § 3553(a), to consider relevant factors through a transparent process of reasoned sentencing judgment.

Significantly, in those courtrooms and cases in which district judges have thoughtfully attended to the provisions of § 3553(a) after *Booker*, the move away from a Guideline-centric sentencing process has generally furthered, not frustrated, the goals pursued by Congress when it enacted the Sentencing Reform Act. The most thoughtful post-*Booker* district court decisions demonstrate that an emphasis on § 3553(a) can make federal sentencing decision-making more principled, even-handed, transparent and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion; (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing; (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; and (4) reordering outcomes so that defendants most deserving of reduced (or increased) sentences receive the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines. *See generally* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341, 347-55 (2006).

The Court might be concerned that, with an emphasis on the commands of § 3553(a) and on individual judges exercising reasoned judgment, there is an increased risk of sentencing disparity. Indeed, it is possible that the reasoned judgment of a federal district judge in Wisconsin may differ from the reasoned judgment of a judge in Utah or New York

or Nebraska. But there is considerable evidence that the pre-*Booker* Guideline-centric sentencing process may have undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (arguing Guidelines *increased* sentencing disparity in the federal system); *see also* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (spotlighting Guidelines' inability to regulate prosecutorial discretion and noting increased impact of that presentencing discretion under the Guidelines).[3]

Perhaps more importantly, even though achieving greater sentencing consistency was one goal of the Sentencing Reform Act of 1984, it was not the only goal. The nuanced provisions of § 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed "the need to avoid unwarranted sentence disparities" as only one of seven distinct sentencing considerations. *Cf.* Morris, *supra*, at 274 ("[E]quality in punishment is not an absolute principle; it is a value to be weighed and considered among other values."); Kate Stith & Jose A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187, 187 (1999) ("Uniform treatment ought to be *one* objective of sentencing, to be sure, but not the sole or overriding objective. A *just* sentence must also be a reasoned sentence and a proportional sentence, imposed through procedures that comport with our

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[3] Moreover, an undue emphasis on uniformity in the federal system may exacerbate unwarranted disparities on the local level as between federal and state sentences for the same criminal conduct. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-35, 753-65 (2002).

basic understandings of due process of law in a constitutional system of checks and balances.").

Further, this Court's modern sentencing jurisprudence must be viewed as a dramatic and important statement that a range of values—such as our society's commitment to fair procedures, adversarial justice and the proper constitutional roles of juries and judges—needs to be balanced with and integrated into a modern quest for greater sentencing consistency. Absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing that a just sentencing system should also strive to be thoughtful and reasoned, humane and respectful to all persons it impacts. Developing post-*Booker* doctrines that encourage judges to exercise reasoned judgment focused on the provisions of § 3553(a) is a step in the right direction as a matter of federal sentencing policy as well as a matter of constitutional jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should resolve these cases in a manner that emphasizes the critical importance of judicial sentencing discretion and suggests the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

Respectfully submitted,
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IN THE

Supreme Court of the United States

VICTOR A. RITA, *Petitioner,*

v

UNITED STATES, *Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* MARC MILLER, MICHAEL O'HEAR, KATE STITH, RONALD WRIGHT, ROBERT FISKE, JAMES RICHMOND, EARL SILBERT, AND PETER VAIRA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

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INTEREST OF AMICUS CURIAE[1]

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

white-collar and organized-crime cases. Her book on the federal sentencing guidelines, *Fear of Judging* (with J.A. Cabranes), was awarded a Certificate of Merit by the ABA in 1999.

Ronald Wright is Professor of Law at Wake Forest University School of Law. Wright has written extensively on the federal and North Carolina state sentencing systems. Prior to joining the academy he served as a Trial Attorney with the United States Department of Justice, prosecuting white-collar criminal cases.

They are joined by four attorneys who formerly served as United States Attorneys and in other capacities within the U.S. Department of Justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Rita*, No. 05-0674 (4th Cir. April 27, 2006) (unpublished), the United States Court of Appeals for the Fourth Circuit affirmed Victor Rita's thirty-three month within-guideline sentence for perjury. Neither the trial court nor the appellate panel discussed the relevance of any of the factors that the Sentencing Reform Act ("SRA") demands that courts "shall consider" in every case, including the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. § 3553(a)(1), the various purposes of sentencing, 18 U.S.C. § 3553(a)(2), the kinds of sentences available, 18 U.S.C. § 3553(a)(3), or the goal of avoiding unwarranted sentence disparities for similar offenders and offenses, 18 U.S.C. § 3553(a)(6).

Victor Rita was a 57-year-old decorated veteran of two wars. Rita has severe health problems, including diabetes and multiple effects from exposure to Agent Orange in Vietnam. In affirming Rita's sentence the appellate panel noted:

> Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)

(citing United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005), cert. denied, 2006 WL 271816 (2006)).

Seven circuits provide a presumption of reasonableness to a sentence imposed within a guideline range after *United States v. Booker*, 543 U.S. 220 (2005). *See United States v. Alonzo*, 435 F.3d, 551 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). In *Mykytiuk*, the Seventh Circuit wrote that "the guidelines reflect 'eighteen years' worth of careful consideration of the proper sentence for federal offenses,' and the need for 'uniformity.'" 415 F.3d at 607-608.

Four courts of appeals initially adopted a presumption of reasonableness with no reason at all, *see United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Lincoln* , 413 F.3d 716 (8th Cir. 2005). Courts in each circuit later justified the presumption with the assertion that the guidelines already incorporate the sentencing purposes and factors set forth in 18 U.S.C. § 3553(a). *See United States v. Cage*, 458 F.3d 537, 542-43 (6th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson* , 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). The D.C. Circuit has not given any reason for adopting the presumption, other than that its "sister circuits" had done so. *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

Five circuits have rejected a presumption that a sentence within the applicable guideline range is reasonable, and instead demand judicial consideration of the factors listed in section 3553(a). *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006); *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Cooper* , 437 F.3d 324, 331-32 (3d Cir. 2006).

The idea that the guidelines should receive substantial deference despite this Court's remedial opinion in *Booker* was first articulated in a rapidly circulated and widely discussed decision from the Honorable Paul J. Cassell in the District of Utah. Judge Cassell's long opinion began: "Yesterday the Supreme Court handed down its decision in *United States v. Booker*...." *United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005). The Court allowed briefing and argument on the question of the relevance of *Booker* to Wilson's sentence—such briefing and argument to be made in the spirit of the Red Queen, following issuance of the opinion. *Id.* at 961 ("The court is ... reluctant to delay the sentencing in this matter to ponder over the meaning of *Booker*. ... At the same time, however, the court realizes that its opinion may touch on subjects about *Booker* that the parties wish to brief. Accordingly, the court will hold the judgment in this matter in abeyance for ten days to give either side an opportunity to file any objection to any of the conclusions in this opinion."); *cf.* Lewis Carroll, Alice in Wonderland, Chapter 5 (orig. pub. 1865) ("there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.").

The idea that a sentence within the applicable guideline range is presumptively reasonable after *Booker* has been justified by assertion, and assertion alone. *See, e.g.*, *Wilson*, 350 F. Supp.2d at 915 ("Over the last 16 years, the Sentencing Commission has promulgated and honed the Guidelines to achieve these congressional purposes...."); *Claiborne*, 439 F.3d at 481 ("The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable."). Nothing in the Sentencing Reform Act after the excision of section 3553(b) by this Court in *Booker* creates such a presumption, nor does the language of *Booker* itself. No case actually looked at what the United States Sentencing Commission had in fact done or

said in justification of particular guidelines and applicable amendments, and in particular with regard to section 3553(a) factors. These cases interpreting section 3553(a) after *Booker*—like many cases interpreting departures under section 3553(b) before *Booker*—instead simply assert in some cases and assume in others that the United States Sentencing Commission *must have* already considered and incorporated the factors Congress directed judges to consider in section 3553(a).

Any assumption that the United States Sentencing Commission *must have* considered section 3553(a) factors is contrary to law and fact. It is contrary to the requirements of the SRA. It is contrary to this Court's remedial opinion in *United States v. Booker*. And it is contrary to fundamental principles of administrative law.

Any assumption that the United States Sentencing Commission considered section 3553(a) factors is also contrary to the thin administrative record the United Sentencing Commission produced for most of its 696 amendments. Assertion to the contrary by the United States Sentencing Commission after the fact, or similar *ex post* assertions by the United States Department of Justice, does not make it so. *Compare* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 79-180, 142-153 (2004) (making no general claim that guidelines incorporated section 3553(a) factors, an after-the-fact assertion that the Commission prioritized "proportionate punishment"—language not used in section 3553(a)(2)) *with* Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at http://www.ussc.gov/Blakely/bookertestimony.pdf (last visited December 14, 2006) ("[T]he factors the Sentencing Commission has been required to consider in developing the

Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision."). To the contrary, *ex post* assertions by the Commission, the Department of Justice and by appellate courts that section 3553(a) factors have been considered highlights the absence of contemporaneous explanation for most amendments and guidelines.

ARGUMENT

I. The Sentencing Reform Act, As Modified By *United States v. Booker*, Does Not Create A Presumption of Reasonableness for Sentences Within The Applicable Guideline Range.

Before this Court's decision in *Booker*, the Sentencing Reform Act provided two critical procedural directions to sentencing judges. First, judges were directed in 18 U.S.C. § 3553(a) to consider seven factors in every case, including—as the fourth listed factor—the applicable sentencing guidelines:

> **§ 3553. Imposition of a sentence**
>
> **(a) Factors to be considered in imposing a sentence.**
>
> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. *The court, in determining the particular sentence to be imposed, shall consider:*
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for:

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code , subject to any amendments made to such guidelines by act of Congress....

(5) any pertinent policy statement—...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(emphasis added). Second, 18 U.S.C. § 3553(b) told judges when the guideline sentence and range "referred to in subsection (a)(4)" should be applied, and when departures from the guideline sentence and range would be appropriate.

> **(b) Application of guidelines in imposing a sentence.**
>
> **(1) In general.**—...[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2)....

While Congress directed the United States Sentencing Commission to consider the purposes of sentencing listed in section 3553(a)(2), on its face the Sentencing Reform Act (SRA) sharply delineates the different institutional obligations of the Commission and courts. The obligations of judges are far more focused on the facts and circumstances of individual cases, and the statute invites judges in each case to test and, when appropriate, depart from the guidelines.

Until this Court resurrected section 3553(a) in *Booker*, however, there is little evidence that the federal courts or the United States Sentencing Commission were aware that section 3553(a) existed, and compelling evidence that no court or institution read section 3553(a) on its face: as a directive to sentencing judges to guide their analysis in every case ("[t]he court ... shall consider"), including the parsimony requirement that judges "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

The only appellate decision to explicitly affirm a trial court's sentence based on consideration of section 3553(a) factors was reversed by that same circuit, sitting en banc. *United States v. Davern*, 937 F.2d 1041 (1991), *rev'd* 970 F.2d 1490 (6th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993).

Instead, federal courts before *Booker* treated section 3553(a) as a background directive *addressed by Congress to the Sentencing Commission*, and treated section 3553(b) as the only operative statutory provision in determining a sentence or reviewing a sentence on appeal.

The remedial portion in *Booker* has made a knee-jerk recitation of section 3553(b) an impossible end point in guideline sentencing decisions; for the first time, this Court focused the attention of the entire federal sentencing system and advocates on the text and meaning of section 3553(a).

Or so this Court might have thought. However, a sufficiently strong presumption of reasonableness attached to any guideline range or guideline calculation simply recreates in new guise the old reading of section 3553(b) as the be all and end all of federal sentencing. Effectively eliminating section 3553(a) before *Booker* was an inadequate reading of clear statutory text; it is all the more inadequate in the face of *Booker*, which resurrected section 3553(a) as the operating instructions for calculating and explaining sentences, and which removed the more presumptive aspects of section 3553(b) as the plausible excuse for ignoring 3553(a) in the past. Any interpretation of section 3553(a) which accords too heavy a weight to any of the factors—including the applicable guideline sentence—runs up against the plain terms of section 3553(a) which state that a judge shall consider all seven factors in every case, including the offender and offense characteristics and the appropriate purposes of punishment.

The *Booker* remedial opinion "severed and excised" section 3553(b)(1), 543 U.S. 220, 245 (2005), and altered the standard of appellate review to de-link the previously man-

datory application of the guidelines and prior *de novo* appellate review of the correctness of each guideline application. The Court emphasized that sentencing courts must still "consider" the guideline range as part of the multi-part section 3553(a) calculus. *Id.* at 245, 259, 264 (citing section 3553(a)(4)).

Any standard of guideline application or review which so privileges guideline ranges and calculations over the other relevant facts in each case—which makes the fourth step of section 3553(a) the first step and presumptively sufficient on its own—recreates the binding effect of now-excised section 3553(b).

The appellate standard of reasonableness for review of all sentences after *Booker* reinforces this straightforward reading: that the guidelines must be considered under section 3553(a)(4), but that consideration of the guidelines alone is never sufficient. "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." 543 U.S. at 765-766.

Treating within-guideline sentences or any specific guideline calculation or policy statement as presumptively reasonable effectively writes out of the statute the remaining factors of section 3553(a), which judges must consider as well. Asserting that the United States Sentencing Commission incorporated the other section 3553(a) factors in its guidelines simply recreates section 3553(b)—making the guideline sentence presumptively correct (reasonable) "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Judicial factfinding in such a system, this Court held in *Booker*, violates the Sixth Amendment.

II. The Commission Has Not Articulated How It Incorporated the Section 3553(a) Factors.

Congress created the United States Sentencing Commission to develop guidelines for federal judges in sentencing criminal offenders. Such rule-making is akin to the work of other federal administrative agencies. Administrative rules deserve deference from the federal courts only when the agency sets forth the relevant facts on the administrative record and articulates a rational connection between the available facts and the policies that the agency has chosen.

When it issued the original sentencing guidelines, the Sentencing Commission partially complied with the ordinary task of an administrative agency to justify its choices. Given the limited time available to the Commission and the commitment of the original Commissioners to begin an evolutionary process that would provide a firmer basis for the guidelines over time, this initial agency action was reasonable.

During its work over the next two decades, however, the Commission never fulfilled the promise to articulate an adequate factual basis for the original Guidelines or for the many amendments that followed. It never developed the habit of justifying its amendments by explaining – rather than merely asserting – the connection between those policy choices and the statutory purposes of sentences.

No other administrative agency receives a presumption of reasonableness for its rule-making or adjudication based merely on the fact that the agency has existed for a long time, or based on the agency's bare assertion that its choices are reasonable. In the absence of an adequate explanation for its original guidelines or its significant amendments, courts should not grant a presumption of reasonableness to the Commission's work.

A. The Original Sentencing Commission Did Not Claim that the Initial Sentencing Guidelines Adequately Accounted for the Section 3553(a) Factors.

The original members of the Sentencing Commission stated that their initial sentencing guidelines, drafted in 1987, were based on the past practices of federal sentencing judges. The Commission's 1987 Supplemental Report on the drafting of the Guidelines described the database of federal sentences that the Commission assembled. It compiled certain data about the characteristics of the offenses and the offenders in those cases. According to (then) Judge and Commissioner Breyer, the Commission then selected the "categories" of guideline factors in light of those past cases, hoping to make guideline sentences turn on some of the same case features that commonly influenced sentences before the guidelines. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988). Commissioner (and Judge) William Wilkins offered a similar account that stressed reliance on past judicial practice. William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571 (1992) ("The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that grounds itself in existing sentencing practices.").

It is not possible, from the face of the administrative record, *see* 18 U.S.C. § 3553(b), or from other statements of the Commission, to determine exactly how the data on past practices translated into many of the features of the initial guidelines. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998). The Commission appears to have col-

lected no data on many factors that appeared in the initial guidelines. The Commission's explanation for many key features of the guidelines was summary in style and did not reveal any of the knowledge-based reform Congress demanded in the SRA.

The past practices that purportedly formed the basis for the guidelines are not the same as the sentencing purposes of section 3553(a), and the administrative record for the Commission's original guidelines do not elaborate on how past judicial practices serve any particular statutory purpose, or any designated combination of purposes. None of the accounts from the Commission itself or from individual Commissioners make any claim that the original guidelines adequately determined the proper operation of the purposes of sentencing, listed in section 3553(a)(2), for all federal sentences or for any subgroups of offenses or offenders. *See* Marc Miller, *Purposes At Sentencing*, 66 So. Cal. L. Rev. 413 (1992). The Introduction to the Guidelines, which explained the Commission's initial policy choices and the rough empirical foundations of the original guidelines, has never referred to section 3553(a), either in its original or evolved form. Nor have the "Application Instructions" directed judges to consider section 3553(a) factors. U.S.S.G. §1B1.1.

Even if "past practice" somehow did incorporate some of the section 3553(a) factors properly on average across the entire collection of cases that the Commission studied—a claim for which we think there is no basis in the record or in fact—it does not necessarily capture any judgment about the proper mix of purposes for any categories of offenses or offenders, or for particular cases.

It is not clear how the Commission *could* account for all section 3553(a) factors; the Commission is given directly authority over a different list of factors. The only one of the section 3553(a) factors that the Commission is directed to consider throughout the SRA are the purposes of sentencing listed in section 3553(a)(2). But such consideration of pur-

poses by the Commission does not supplant consideration of the applicable purposes by judges in the light of the offender and offense facts and available sentences in each case, and to "impose" a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes.

> Congress made the purposes of sentencing the foundation for the development of the first comprehensive federal sentencing system. The Act mentions the purposes of sentencing eighteen times. Some of those references refer to the work of the Commission in crafting guidelines. Congress instructed the Sentencing Commission "to establish sentencing policies and practices" that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." Congress specified the achievement of the listed statutory purposes as the Commission's first duty in formulating the guidelines.

Marc Miller, *Purposes at Sentencing*, supra at 417 (footnotes omitted).

Evidence that the Commission has not adequately or reasonably explained the role of purposes in the guidelines comes from the effort in two scholarly articles to "rationally reconstruct" the Commission's purposes by looking at the Guidelines. The scholars came to dramatically different conclusions, even though they started with the same guidelines and accompanying explanations. *Compare* Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*. 52 Emory L.J. 557 (2003) *with* Paul Hofer & Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19 (2003).

Even if the original Commission had considered the section 3553(a) factors in relation to all the conduct it decided was relevant to sentencing, that assessment would be suspect after *Blakely* and *Booker*, and counsel against any presumption of reasonableness for guidelines built on this foundation. The Introduction to the Guidelines Manual heralded the ac-

complishment of the Guidelines in setting punishment on the basis of "relevant" conduct beyond the offense of conviction. But *Blakely* and *Booker* teach that there is a constitutional distinction between convicted conduct and other crimes that were not charged or proved to a jury beyond a reasonable doubt. *See* David Yellen, *Reforming the Federal Guidelines' Misguided Approach to Real Offense Sentencing*, 58 Stan. L. Rev. 267 (2005) (emphasizing the extreme position of the federal guidelines relevant conduct compared to state guideline systems in the light of *Booker*). Reading section 3553(a) in light of *Blakely* and *Booker* undermines the original Commission's choice to treat non-offense conduct as the equivalent of offense conduct; the relevant conduct rules ignore the significance of the word "offense" in section 3553(a). Hence even if the Guidelines, largely written before *Blakely* and *Booker*, sought to incorporate section 3553(a) factors, they do not do so because of a fundamental constitutional misunderstanding prior to *Blakely* and *Booker*. Specifically, the Guidelines provide for over-punishment in cases where there is significant aggravating non-offense-of-conviction conduct.

Every observer should acknowledge that the original Commission faced an overwhelming drafting challenge within a short time frame. It is little wonder that the Commission could not, under those circumstances, consider the proper operation of various sentencing purposes for different categories of offenses and offenders. It would have been impossible, in that setting, to place on the administrative record the sort of factual support that would normally be needed to sustain on judicial review an administrative policy choice.

The Commission's original reliance on "past practices," therefore, was coupled with a declaration that the Guidelines would evolve. The factual record and explanation on the record that would ultimately be necessary to sustain the Guidelines could be assembled over time.

Tragically, the Sentencing Commission never delivered on its initial promise to strengthen the connections between

its guidelines and the purposes and empirical research that the statute required for a foundation. Instead of evolution, the Commission gave us *ipse dixit*. The abandonment of the ideal of evolving and well-supported guidelines is reflected in changes over time to the language of the Introduction to the Guidelines. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999) (documenting the shifting language). The failure to deliver on the promise of an evolving and increasingly well-supported set of Guidelines appears not only in the shifting language of the Introduction, but also in the pattern of guideline amendments over the years.

B. Guideline Amendments Have Not Adequately or Reasonably Incorporated the Purposes of Sentencing Under Section 3553(a).

The Sentencing Commission has issued 696 amendments to the guidelines. The Commission has not, however, carried out the original plan to provide adequate factual basis and explanation for the guidelines. In particular, the Commission has not linked its amendments to a discussion, rather than a passing invocation, of the statutory purposes of sentencing. The limited data that the original Commission had available to it made it impossible to employ an empirical basis for assigning weights to many sentencing factors in the original Guidelines. Even more significantly, there is no indication that in subsequent amendments the Commission employed *any* empirical basis for assigning weights to many factors it identified in such amendments.

On occasion the Commission's announcement of the amendment includes a passing reference to one of the classic purposes. For example, in 1989, when it increased the offense level corresponding to the amount of loss from theft and fraud, the Commission noted that the reason for the

amendment was "to provide additional deterrence and better reflect the seriousness of the conduct." 1989 U.S.S.G., app. C, amend. 99. A detailed 1990 amendment that substantially increased the sentencing range for arson included the following explanation, which in its entirety reads:

> This amendment restructures this guideline to provide more appropriate offense levels for the conduct covered. The Commission has determined that the offense levels provided in the current guideline do not adequately reflect the seriousness of the offenses that are covered under this section. The effective date of this amendment is November 1, 1990.

1990 U.S.S.G., app. C, amend. 330.

Because the references to "additional deterrence" and to the need to reflect the seriousness of the offense are unsupported by evidence or explanation of how the existing guideline failed to adequately deter or reflect the seriousness of the behavior, it is impossible for a court to judge the adequacy or reasonableness of the Commission's consideration of sentencing purposes. Criticism of the lack of explanation for amendments and the lack of connection to the purposes of sentencing is longstanding. *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-320 (1989) (criticizing amendment 116 for "gratuitously" increasing fraud penalties based on "overtly political" and "inexpert" grounds without a foundation in data and without conducting statutorily required assessments); Marc Miller, *Purposes At Sentencing*, 66 So. Cal. L. Rev. 413, 443-448 (1992) (citing the absence of discussion or evidence of purposes of punishment in guideline amendments). The radical failure of explanation in guideline amendments reveals an agency that might be described not as a "junior varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting), but a "junior varsity administrative agency."

The failure of explanation is perhaps most obvious in those instances where the Commission intended to resolve splits in the circuits—splits that are only occasionally identified in amendments. *See, e.g.*, U.S. Sentencing Guidelines Manual Appendix C, Amendment 500; *id.*, Amendment 518. In such instances the Commission's goal presumably would be to maintain reasonable conformity in law. But such a goal does not make the minimal demands of explanation any less significant. In such instances, the Commission's reasons for choosing one side in the split over the other side look more like a Roman emperor at the coliseum issuing a thumbs down than like the reasoned appellate judicial review that such a decision might replace. The failure of explanation, in sharp contrast to the opinions of this Court, might lead the Commission to be called a junior varsity Supreme Court.

These unadorned invocations of sentencing purposes would not provide the sort of reasoned decision-making that the SRA expected of the Commission. The conclusory mention of a purpose from any other administrative agency would not satisfy its obligations to provide an adequate factual basis and to demonstrate the connection between the facts and the policy chosen; neither should it suffice for the Sentencing Commission.

1. The military service amendment illustrates the inadequate quality of the Commission's explanation and use of sentencing purposes.

Particularly relevant to the sentence in Victor Rita's case was the 1991 amendment that made a defendant's past military service "not ordinarily relevant" to the sentence. See 56 Fed. Reg. 779-80, amend. 24 (1991). During the first four years of sentencing under the guidelines, several federal courts decided that a defendant's prior military service constituted an appropriate basis for a downward departure from the guideline sentence. For instance, in *United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988), the defendant

was charged with theft of mail matter by a postal employee. The presentence investigation report revealed that the defendant served for four years in the United States Marine Corps. During his year of combat in Vietnam, he earned over 45 awards of the Air Medal, including one special award for heroism. The Probation Office considered this military service "to be simply a form of employment history," and gave it no weight in the sentencing calculus. The court, however, noted the "lack of any discussion of military history" in the administrative record of the Sentencing Commission and explained why a person's military record should be relevant at sentencing:

> An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.

After "considering all the factors set forth in 18 U.S.C. § 3553(a)," the court departed from the guidelines and sentenced Pipich to probation. *See also United States v. McCaleb*, 908 F.2d 176, 179 (7th Cir.1990) (defendant's military record might, under some circumstances, warrant a downward departure; district court's refusal to make such a departure was unreviewable); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir.1990) (military service may warrant a downward departure "in an unusual case," but downward departure was not justified because defendant served only as a recruiter).

On the other hand, some courts refused to consider military service as a departure ground. In *United States v. Chiarelli*, 898 F.2d 373 (3d Cir. 1990), the defendant

enlisted in the United States Marine Corps in 1961 and was honorably discharged after four years of service. He spent approximately eighteen months in Okinawa and was a lance corporal at the time of his discharge. The sentencing judge refused to consider his past military service as a potential ground for a downward departure, and the Third Circuit upheld this decision. Chiarelli's argument, the court said, "posits a substantive due process right to individualized treatment in sentencing. This argument has no vitality after our decision in *United States v. Frank*, 864 F.2d 992, 1009 (3d Cir.1988)."

The Sentencing Commission entered the field in 1991 and amended its policy statements to make a defendant's past military service "not ordinarily relevant" to the guideline sentence or the departure decision. The explanation for Amendment 386 follows:

> Reason for Amendment: This amendment expresses the Commission's intent that the factors set forth in this part are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range; but that, unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range. The language within these sections is revised for clarity and consistency. In addition, this amendment adds language that expressly states that the guidelines do not apply to defendants sentenced as juvenile delinquents; and sets forth the Commission's position that physical appearance, including physique, military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

The Chair and General Counsel of the Commission later explained that the restriction in Amendment 386 of consideration of military service and a variety of other offender

characteristics was intended to promote uniformity in sentences.

> [The] continued litigation involving these issues influenced the Commission to issue this new policy statement. The subsequent apparent decrease in appellate cases involving a departure for these reasons suggests that the policy statement effectively communicated Commission intent that departures based on offender "good citizen" characteristics rarely would be appropriate.

William Wilkins & John Steer, *The Role of Sentencing Guideline Amendments in Reducing Sentencing Disparity*, 50 Wash & Lee L. Rev. 63, 84 n. 107 (1993).

Neither the contemporaneous explanation by the Commission, as required by 28 U.S.C. § 994(p), nor the *ex post* justification by the then Commission Chair and General Counsel, pass a minimal threshold of justification that should satisfy appellate courts reviewing either the reasonableness of the rule or the relevance of such factors in future cases. There is an almost total absence of both empirical and jurisprudential justification behind Amendment 386.

Military service has long been recognized in many systems, including the federal system before the implementation of guidelines, as relevant to sentencing in some cases. *See e.g., United States v. North*, No. CR. 88-00080- 02, 1989 U.S. Dist. LEXIS 7190 (D.D.C. July 5, 1989). Courts in several states have found military service to be a relevant sentencing factor. *See, e.g., State v. Knight*, 2006 WL 1491573 (Tenn. Crim. App. 2006); *Stout v. State*, 834 N.E.2d 707 (Ind. App. 2005); *Farmer v. State*, 777 N.E.2d 1025 (Ind. App. 2002). Judge Harlington Wood of the United States Court of Appeals for the Seventh Circuit (and before that of the Southern District of Illinois) observed, in reflecting on the guidelines:

> I cannot see myself giving a defendant who had been awarded the Medal of Honor the same sentence I might give to another defendant in a similar situation. Under

> the Guidelines, the Medal of Honor recipient would have to be sentenced, as I see it now, the same as someone who had not served his country at all.

Harlington Wood, *Sentencing Symposium: Panel Remarks*, 44 St. Louis U. L.J. 418 (2000). It is not surprising that sentencing judges would consider military service relevant for some offenders. As discussed in the Brief Amici Curiae of the National Veterans Legal Services Program and the Veterans for America, military service traditionally carries more moral weight than other prior employment, and military service is often intertwined with various physical and mental illnesses that disproportionately affect veterans.

The limitation on consideration of military service at sentencing was not grounded in any reason or justification worthy of judicial respect. The sad irony for this guideline is that it deals with a claim to recognition for the most basic contribution of citizens to their country, and therefore a claim to respect. Victor Rita, like others who have served had the legal right to have "the history and characteristics of the defendant" considered by the sentencing court. 18 U.S.C. § 3553(a)(1). Like those who serve our country now in Iraq and Afghanistan, but later go astray, sometimes that good service should matter; sometimes the scale ought to weigh elements of an offender's life beyond the bad acts.

Before the Guidelines, offender characteristics such as military service, gender, intoxication, drug addiction, employment and economic status, family situation, and the like had a substantial impact on sentences. *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 n. 76 (1999). Perhaps guidelines could be written that would reasonably justify a limitation on the consideration of this factor, but the current Sentencing Guidelines do not.

A presumption of reasonableness to a within-guidelines sentence after *Booker* would create respect for rules where

none has been earned. The path towards sound consideration of the relevant factors in each case is to require judges to follow the terms of each part of section 3553(a), and to reject any presumption of reasonableness for within-guideline sentences.

2. The lack of a criminal history category for true first offenders illustrates the need for a case-by-case assessment of Section 3553(a) Factors.

Many offender characteristics have received only passing attention in the guidelines, policy statements, and explanations for guideline amendments. On the other hand, the Commission has offered a more detailed explanation for its treatment of one offender characteristic: the defendant's prior criminal record. This factor is built into the very structure of the guidelines grid. It has been the subject of discussion in Commission reports and in the explanations for some guideline amendments. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), www.ussc.gov/publicat/Recidivism_General.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf. Even for this centrally-important offender characteristic, however, the connection between the sentencing factor and the purposes of sentencing in section 3553(a) is absent in at least some cases.

A substantial number of offenders with no prior convictions are imprisoned in federal correctional facilities. The group of offenders who have zero criminal history points is a dramatic portion of all federal offenders: in 2005 the Commission reported that 45.4 % of all offenders had zero criminal history points. U.S. Sentencing Commission, Annual Report, Table 21 (2005). These true first-time offenders are treated comparably at sentencing to other offenders who

have a limited criminal history, including some who were convicted of violent felonies.

As demonstrated in the research of former Commissioner Michael O'Neill, and in Commission reports, true first offenders present very different risks of recidivism from the other defendants within Criminal History Category I. Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291 (2001); Michael Edmund O'Neill, Linda Drazga Maxfield & Miles Harer, *Past as Prologue: Reconciling Recidivism and Culpability*, 73 Fordham L. Rev. 245 (2004). The Commission has found that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism. *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 15 (Jan. 4, 2005). Commission reports have concluded that first offenders are more likely to be involved in less dangerous offenses and that their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role, or acceptance of responsibility. They are also more likely than offenders with criminal histories to have a high school education, to be employed, and to have dependents. *Recidivism and the First Offender* (May 2004), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

Despite the compelling evidence of the incomplete nature of the original criminal history score, the Commission still prohibits a departure below the applicable range for Criminal History Category I. *See* U.S.S.G. § 4A1.3(b)(2). A sentencing court considering the section 3553(a) factors when faced with a first offender such as Mario Claiborne, the petitioner in the companion case, No. 06-5618, might reasonably decide to treat the first offender differently from other defendants whose prior records keep them within Category I.

A court assessing the reasonableness of this guideline should also consider the directive from Congress to the Commission in the Sentencing Reform Act to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

Far from demonstrating the presumptive reasonableness of the guidelines or the applicable guideline range, the multiple dimensions on which this guideline has been found wanting—ignoring statutory commands, empirically empty, theoretically incomplete, practically gross—should lead if anything to a presumption that offender characteristics as a class have not been "adequately considered" or "reasonably justified." In the absence of grounded or coherent guidelines across offender characteristics, the statute leaves for judges, following the commands of §§ 3553(a)(1), 3553(a)(2), and 3553(a)(6), to determine through common-law reasoning and deferential reasonableness review the role that such factors should play.

C. Federal Courts Should Review the Work of the Sentencing Commission Using the Familiar Standards of Review That Apply to Other Administrative Agencies.

The provisions of the SRA only apply certain portions of the Administrative Procedure Act (APA) to the work of the United States Sentencing Commission. The SRA, at 28 U.S.C. § 994(x), applies the publication requirements of the APA rulemaking process to the Sentencing Commission, but it does not apply the judicial review provisions of the APA to the Commission.

Nevertheless, Congress assigned to the federal courts a review function similar to that applied under the judicial review provisions of the APA in the original SRA departure

standard, 18 U.S.C. § 3553(b). Section 3553(b) instructs the courts to determine whether the Commission "adequately" considered factors during the creation of the guidelines. *See* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal. L. Rev. 1 (1991).

The parallels to the factual basis required of administrative agencies under the APA are reinforced by multiple provisions of the SRA that emphasize the role of empirical evidence in the Sentencing Commission's work. The SRA charges the Commission with developing means of measuring the effectiveness of sentencing practices, 28 U.S.C. § 991(b)(2), and grants the Commission various information-gathering powers, research mandates, and educational functions. See 28 U.S.C. § 995(a)(8)-(9), (12)-(19).

More evidence that Congress expected the Sentencing Commission to place its justifications for sentencing guidelines on the record for review appears in 28 U.S.C. § 994(p). That provision states that proposed amendments to sentencing guidelines "shall be accompanied by a statement of the reasons therefor." This language functions in much the same way as the APA requirement for informal rulemaking that the agency provide a "concise general statement of basis and purpose." 5 U.S.C. § 553.

The Sentencing Reform Act also defines the "administrative record" available to the court when determining whether the Commission gave "adequate" consideration to a factor. A 1987 amendment to the statute instructs courts, when considering whether the Commission has adequately foreclosed a ground for departure, to consider only three sources: (1) the guidelines themselves, (2) policy statements, and (3) official commentary. *See* 18 U.S.C. § 3553(b). The Commission's reasons for adopting or amending a guideline must appear on the face of this administrative record; as a corollary, any assertion of reasons appearing elsewhere may not be considered by courts in assessing whether the Commission adequately considered a particular factor.

Congress' desire that data and knowledge drive sentencing reform places an even higher burden on the Commission in justifying its rules and amendments. See 28 U.S.C. § 991(b)(1)(C) (guidelines to be drafted and revised based on "advancement in knowledge of human behavior as it relates to the criminal justice process").

Federal courts normally defer to the decisions of federal administrative agencies if those agencies provide an adequate explanation for their choices. When an administrative agency creates rules under the notice-and-comment process of 5 U.S.C. § 553, the APA instructs federal courts to uphold the validity of those rules so long as they are not "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

The federal courts have elaborated on what administrative agencies must do to demonstrate that their rules are not arbitrary and capricious. Above all else, the agencies must articulate the connection between the facts available to the agency and the policy chosen. In *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), this Court invalidated a rule of the National Highway Traffic Safety Administration that revised the requirements for the installation of air bags on automobiles, noting that, when an agency adopts a regulation altering its "former views as to the proper course," it must "supply a reasoned analysis for the change." The *State Farm* opinion offered this general observation about the obligations of an administrative agency to support its policy choices:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

See also Richard J. Pierce, Jr., Sidney A. Shapiro, & Paul R. Verkuil, Administrative Law and Process § 7.5 (4th ed. 2004) ("Typically, the agency's findings and conclusions must be linked to the action it takes through a chain of reasoning. [The] agency must state its reasons in support of its action, and those reasons are subject to judicial review....").

A recent example of this "hard look review" in action appears in *Ecology Center, Inc. v. U.S. Forest Service*, 451 F.3d 1183 (10th Cir. 2006). The plaintiffs asked for declaratory and injunctive relief to stop the U.S. Forest Service from approving a "Resources Management Project" that would allow logging on public land, because they claimed that the logging activity would adversely affect the endangered northern goshawk. The relevant regulations required the Forest Service to consider the "best available science" when implementing site-specific projects. The Forest Service approval of the plan specifically discussed a leading scientific report about the potential effects on the northern goshawk's habitat, and asserted that the proposed logging project would actually improve habitat conditions. The court, however, was unconvinced. The Forest Service used the scientific report selectively, and when the agency's "conclusions differ with the report's 'best available science' it simply argues that we must defer to its expertise." The court reversed this inadequately explained agency decision as arbitrary and capricious. The Sentencing Commission's amendments to the guidelines deserve no greater judicial deference.

The provisions of section 3553(a), combined with familiar concepts of administrative review, give federal courts the necessary tools to grant proper deference to the Sentencing Commission. Any deference requires that the Commission apply its expertise to assemble relevant facts and to explain how its policy choices flow from the available facts. The courts can carry out this review function in particular cases by testing applicable guidelines and any suggested sentence and sentencing range against the requirement of a parsimonious sentence, § 3553(a), the offense and offender charac-

teristics of each case, § 3553(a)(1), the kinds of sentences available, § 3553(a)(3), the need to provide restitution to victims, § 3553(a)(7), and the two sets of broader aims—the need to avoid unwarranted sentence disparities in similar cases, § 3553(a)(6), and the need for each sentence to be considered in light of the statutory purposes of sentencing in § 3553(a)(2).

CONCLUSION

Both the substantive and remedial opinions in *Booker* are wholly consistent with the original vision of Congress in the SRA. The task for sentencing judges under the SRA was to be both easier and harder than what came before. Judges were required to explain reasoning previously left behind the veil of discretion. Fortunately, sentencing judges can be assisted in the case-specific assessments by probation officers, and after the implementation of the SRA they have the guidelines, case law, and the arguments of counsel to help produce a just, fair and reasonably consistent system. Both the SRA and *Booker* are consistent with the larger modern sentencing reform movement. Robert Weisberg & Marc Miller, *Sentencing Lessons*, 58 Stan. L. Rev. 1 (2005).

Lower federal courts have had trouble finding their proper role, both before and since *Booker*. Attention to the text of the SRA, the goals of modern sentencing reform, and the scope of reasonableness review after *Booker* should lead this Court to reject presumptive weight for sentences within the applicable guidelines. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), either to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances or to presume that a within-Guidelines sentence is reasonable?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentences are imposed and reviewed in a manner that comports with our Constitution. NACDL's intense concern for the fullest protection of fundamental Fifth and Sixth Amendment rights has led it to appear as *amicus curiae* in this Court on numerous occasions, including in *United States v. Booker*, 543 U.S. 220 (2005), *Blakely* v. *Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court chooses a sentence pursuant to 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court "consider" the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness.

In the nearly two years since this Court remedied the Sixth Amendment violation in *Booker* by leaving the Guide-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

lines merely advisory, the Guidelines continue in practice to exert much the same force as before. The Department of Justice's litigation position is that the Guidelines should be applied as if *Booker* had never been decided. By directive from the Attorney General, "prosecutors must actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*." Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law-_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). District judges are imposing Guidelines sentences at nearly the same rate they did when the unconstitutional system was in place.[2]

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[2] During FY 2003, when departures were reviewed for abuse of discretion, 7.5 percent of defendants received non-government-sponsored below-Guidelines sentences. Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 306 (2006) (Table 3A). Statistics just released by the Commission show that this number increased to only 11.9 percent in FY 2006. U.S. Sentencing Commission, *Preliminary Quarterly Data Report, Preliminary Fiscal Year 2006 Data Through September 30, 2006*, at Table 1, *available at* http://www.ussc.gov/Blakely/Quarter_Report_4Qrt_06.pdf (combining departures and *Booker* variances; also showing that substantial assistance motions and so-called "fast track" dispositions account for almost 90% of government-sponsored downward departures). Significantly, this rate for all of FY 2006 is 0.5 percent *lower* than the rate for the first eight months of the year. U.S. Sentencing Commission, *Special Post-Booker Coding Project*, at 1 (July 6, 2006), *available at* http://www.ussc.gov/Blakely/-PostBooker_060106.pdf (showing 12.4 percent rate of non-government-sponsored below-Guidelines sentences for FY 2006 as of June 1, 2006). This trend is consistent with the "feedback" district judges are receiving from courts of appeals on the limited availability of non-Guidelines sentences even after *Booker*. *See infra*.

Of particular significance in the two cases now before the Court, courts of appeals have continued to give the Guidelines considerable weight by declaring that when a district court imposes sentence within the Guidelines range—a range calculated based on judicial factfinding under a lesser standard of proof—the sentence is presumptively reasonable. *See, e.g., United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006). Several of these courts, echoing the Government's litigation position, have also held that a judge may not vary substantially from such a range absent "extraordinary circumstances." *See, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006) ("the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be"). As a result of these developments in the reasonableness review standard, many pertinent factors are deemed off-limits because the Sentencing Commission supposedly already has taken them into account. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "family ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

There are two fundamental defects with these standards of review. *First*, a requirement of extraordinary circumstances before a judge may substantially vary from the Guidelines range does more violence to the Sixth Amendment than the statute struck down in *Blakely*. The government has defended a Guidelines-centric approach to reasonableness review on the ground that the Guidelines already account for each of the Section 3553(a) factors and purposes a federal judge must consider before imposing sentence. But this Court considered and rejected a remedy that *would* have allowed that approach—factfinding by the jury.

Because judges continue to find facts that determine a Guidelines range, a requirement of extraordinary circum-

stances before a judge may substantially vary from the range suffers the same constitutional infirmity that led this Court to invalidate the mandatory Guidelines in *Booker*. This is because the difference between a Guidelines range based on judicial factfinding and the range authorized by the jury's findings can be considerable. *See, e.g.*, *Booker*, 543 U.S. at 228 (judicial factfinding increased the authorized sentence for Fanfan from a maximum of 78 months to a range of 188 – 235 months). Under the Washington law struck down in *Blakely v. Washington*, 542 U.S. 296 (2004), the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. But to forbid substantial deviation from the Federal Guidelines range absent extraordinary circumstances is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact under the preponderance standard would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because "the judge is bound to impose a sentence within the Guidelines range" in "most cases").

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on class-wide parameters devised by an administrative agency, the empirical bases for both the "extraordinary circumstances" requirement and a presumption of reasonableness for Guidelines sentences (*i.e.*, the notion that the Commission has already accounted for all of the required factors and purposes in its Guidelines ranges) are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve the purposes of sentencing listed in Sec-

tion 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, there is no basis *in fact* for a court of appeals to presume that a sentence within the Guidelines range is reasonable or to require extraordinary circumstances before a judge may substantially vary from it.

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the Sentencing Reform Act, and recognizes the limitations inherent in the Guidelines—is one that focuses on whether the district judge considered *all* of the statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by artificial generalizations about the appropriateness of a sentence range that was created for classes of cases and that was the product of an incomplete assessment of the very factors and purposes *judges* must consider on a case-by-case basis. To be faithful to the remedy in *Booker*, and in recognition of the inherent limitations of the Guidelines, neither the district courts nor the courts of appeals should give special weight to sentences that fall within the applicable Guidelines range.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Substantial Variances From The Guidelines Is Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's principal basis for giving the Guidelines greater weight than the other Section 3553(a) fac-

tors—that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the products of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)—misses the point of *Booker*. This Court made clear that "the mandatory system" Congress enacted "is no longer an open choice." 543 U.S. at 263. The Court rejected the proposed remedy of jury factfinding, which would have allowed the Guidelines to retain their primary role in the sentencing process. Because judges continue to make the factual findings that determine a Guidelines range (or that permit deviation from it), the range must be no more than one factor among many that the judge should consider. Forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances would reinstate a regime in which the Guidelines nearly always receive dispositive weight—a result irreconcilable with the Sixth Amendment right to jury findings.

The state law in *Blakely* limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

A requirement that a judge find the existence of extraordinary circumstances before imposing a sentence substantially above or below the presumptively reasonable Guidelines range suffers the same flaw that led this Court to vacate Blakely's sentence. Under the Eighth Circuit's test, a district court may not substantially deviate from the Guidelines range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating the circumstances found by the judge, for example, the lower the permissible increase in sentence. *See Claiborne*, 439

F.3d at 481 ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). It does not matter, for Sixth Amendment purposes, that judges have the flexibility to vary substantially from the range in *some* cases without making further factual findings. This Court held as much in invalidating the provision that made the Guidelines mandatory. *Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.") By definition, the circumstances in the majority of cases governed by a particular Guideline are not extraordinary, just as departures under the mandatory Guidelines were unavailable in "most cases." *Id.*[3]

The facts in *Booker* and *Fanfan* also illustrate the Sixth Amendment violation. Judicial factfinding increased Fanfan's penalty from a Guidelines range of 63 – 78 months to a range of 188 – 235 months. 543 U.S. at 228. Under a standard of review that is tied to the range determined under the Guidelines, a defendant such as Fanfan could receive a sentence at the higher range—a sentence substantially above the

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[3] It may well be that in theory a "presumption of reasonableness" for Guidelines sentences, by itself, does not raise these Sixth Amendment concerns if it it does not necessarily equate with a "presumption of *unreasonableness*" for *non*-Guidelines sentences. In practice, however, the two have gone hand in hand. *See, e.g., United States v. Bishop*, 2006 WL 3237027 at *10 (10th Cir. Nov. 9, 2006); *United States v. Rogers*, 448 F.3d 1033, 1034 (8th Cir. 2006) (per curiam); *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005). To be unobjectionable, any presumption on appeal must be limited to cases where the judge has followed the correct process—considering all factors and exercising his discretion to impose a sentence sufficient, but not greater than necessary to meet the purposes of Section 3553(a)(2). But if the district judge has improperly considered the Section 3553(a) factors by, for example, giving special weight to the Guidelines, the resulting sentence is not entitled to a presumption of reasonableness whether it is within the Guidelines or not. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

range authorized by the jury verdict—*only* if the judge makes additional findings. Thus, for the "ordinary" or typical defendant—one whose circumstances fall short of "extraordinary"—the district court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (emphasis in original)).

Claiborne involves a downward variance, but there is no reason to think that reasonableness review should mean one thing for upward variances and another for downward variances. *Booker* held to the contrary. 543 U.S. at 266 (rejecting the government's remedy because it "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences" and "[w]e do not believe that such 'one-way lever[s]' are compatible with Congress' intent" (emphases and second alteration in original; citation omitted)).

The constitutional defect is further illustrated by considering how reasonableness review would apply to a sentence that is *at or above* the top of the range determined solely on the basis of facts found by the jury or admitted by the defendant, even though it may be *below* the range determined after additional findings by the judge. After *Booker* and *Blakely*, a district judge operating in a guidelines regime that uses judicial factfinding must have the discretion to impose such a sentence without the additional requirement that he go beyond the jury's findings. Thus, in such a case the sentence must be affirmed if the judge follows the statute's procedural requirements, complies with the Due Process Clause, and does not consider factors forbidden by the Constitution (such as the defendant's race). The sentence may not be reversed on the ground that there were insufficient mitigating factors. Reasonableness review must therefore give judges broad lati-

tude in choosing a sentence—a latitude that is inconsistent with the substantive requirement of extraordinary circumstances.[4]

Reasonableness review cannot mean one thing in cases where the judge's findings produce little or no increase in the Guidelines range and another thing when the range greatly exceeds that based on jury findings alone.[5] A unitary standard of reasonableness review must provide sufficient latitude to account for cases like Booker's and Fanfan's, where judicial factfinding and jury factfinding producing significantly different ranges. And although the need for such latitude would be the same even if such cases were rare, they are not. In drug cases, the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant"

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[4] This Court has held that judges may find facts that trigger a mandatory minimum sentence. *See Harris v. United States*, 536 U.S. 545 (2002). Even assuming that holding survives *Blakely* and *Booker*, *see Harris*, 536 U.S. at 569 (Breyer, J., concurring) (acknowledging that *Apprendi* "cannot easily" be distinguished), *Rangel-Reyes v. United States*, 547 U.S. __ (2006) (Stevens, J., statement respecting denial of petitions for writ of certiorari), it does not apply here, because judicial factfinding changes in tandem *both* the minimum *and* the maximum allowable sentence under the Guidelines. *Cf. Harris*, 536 U.S. at 557 (distinguishing *Apprendi*, because under 18 U.S.C. § 924(c), "the jury's verdict has authorized the judge to impose the minimum with or without the finding"; *Apprendi* does not apply to "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)"); *id.* at 561 ("The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment.")

[5] Nothing in the statute or *Booker* contemplates that the meaning of "reasonable" will depend on the extent of the difference between the range based on jury findings and the range based on judicial findings. Moreover, a standard that varies in such a way would impose undue burdens on the lower courts and be exceedingly difficult to administer consistently in a system with 256 Guidelines range cells.

quantity includes drugs involved in counts that were dismissed, and even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs).[6] Approximately 35 percent of all federal sentences in 2005 were for drug offenses. U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* ("2005 Sourcebook") at 13; *id.* at 313 (showing an increase in the percentage of drug cases after *Booker*). Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors incorporating the amount of loss); *2005 Sourcebook* at 13 (12 percent of cases).

Petitioner Rita's case illustrates how another type of judicial factfinding under the Guidelines—in which the judge uses a "cross reference" to sentence the defendant *as if* convicted of a *different* offense—can significantly increase the Guidelines range. Rita was convicted of perjury, false statements, and obstruction of justice. His offense level based on jury findings was 14. *See* USSG §§ 2J1.2 (obstruction of jus-

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[6] The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*"), at 54 (2004), *available at* http://www.ussc.gov/15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

tice) & 2J1.3 (perjury). But after the government's post-conviction proffer, accepted by the Probation Officer and subject to proof by only a preponderance of the evidence, Rita's Guidelines range was calculated as if he had been convicted of accessory after the fact to an offense that the grand jury was investigating—the purportedly illegal importation of goods by the company from which Rita made purchases—but with which Rita was never charged.

As Rita's brief explains, this cross reference to an offense supposedly committed by a non-party—an offense that was not at issue, much less proved, in Rita's trial—increased his offense level from 14 to 20, doubling both the minimum and maximum of his Guidelines range. With the type of reasonableness review adopted by several circuits, the jury findings alone—supporting a sentence of between 15 and 21 months—would not have authorized a sentence in the enhanced range used by the district judge. To get to that higher range a judge would need to make additional findings—either facts that change the Guidelines range or facts that support a finding of "extraordinary circumstances." Thus, "[t]he sentencing judge would have been reversed" had he imposed a sentence in that higher range without additional non-jury findings. *See Booker*, 543 U.S. at 234-35; *cf. id.* at 234 (noting that the statute in *Blakely* did not provide sufficient flexibility because the judge needed to find "substantial and compelling reasons" to vary from the range). This is precisely the type of sentencing regime that this Court invalidated as unconstitutional in *Booker* and *Blakely*.

On constitutional grounds alone, the standard of review used in the Fourth and Eighth Circuits must be rejected.

II. The History Of The Guidelines Demonstrates That Courts Should Neither Give Them A Presumption Of Reasonableness Nor Require Extraordinary Circumstances For Substantial Variances.

As noted earlier, the Eighth Circuit's presumption of reasonableness for all within-Guidelines sentences is grounded in the belief that the Guidelines take the other Section 3553(a) factors into account and are "the product of years of careful study." 439 F.3d at 481. Even if it were possible after *Booker* to give the Guidelines special weight, the premises on which the court have done so are demonstrably false. The Guidelines were not written to produce sentence ranges that meet all of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on all of the other factors a judge must consider under Section 3553(a). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach the ideal regime envisioned by the drafters of the Sentencing Reform Act, in practice it has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s purposes and factors, the amendment process has had the opposite effect. Thus, as an empirical matter, sentence ranges that are the product of such a process are not entitled to a presumption of reasonableness.

A. The Sentencing Guidelines And The Ranges They Produce For Individual Cases Do Not Incorporate All Of The Sentencing Purposes Or Factors Set Forth In 18 U.S.C. § 3553(a).

The Commission's current Chairman has recently declared that the Guidelines embody each of the sentencing factors set forth in 18 U.S.C. § 3553(a) for every offense and every offender. *See* Testimony of Hon. Ricardo H. Hinojosa,

before the House Subcommittee on Crime, Terrorism, and Homeland Security (Mar. 16, 2005), at 18, *available at* http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf ("The guidelines embody all of the applicable sentencing factors for a given offense or offender.") That simply is not so. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). "[T]he guidelines are inescapably generalizations" that "say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). The Guidelines are entitled to no special weight because they *do not*—and indeed *cannot*—produce sentence ranges that account for each of the various factors and purposes a court must consider when imposing sentence.

1. The Sentencing Guidelines were not written to ensure that a within-Guidelines sentence complies with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Act directed the Commission to devise Guidelines appropriate for "categories of offenses," 28 U.S.C. § 994(c), and "categories of defendants," *id.* § 994(d), recognizing that guidelines could not address the circumstances of every individual. The Guidelines were to be addressed to the purposes of sentencing and the reduction of

unwarranted disparities." *Id.* § 994(f). The sentencing judge, by contrast, was to consider those same matters, 18 U.S.C. § 3553(a)(2), (4), (5), (6), *and also* "the nature and circumstances of the offense" and the "history and circumstances of the offender." 18 U.S.C. § 3553(a)(1).

In the introduction to the first Guidelines Manual in 1987, the Commission acknowledged it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). The Commission only considered trying to account for two purposes, which it described as "just deserts" [sic] and "crime control." *Id.* It candidly acknowledged, however, that because it was unable to tackle the "profoundly difficult" "philosophical problem" of reconciling the interplay of even *those* two sentencing purposes, *id.*, it simply abandoned their use in favor of a system based "by and large, [on] typical past practice, determined by an analysis of 10,000 actual cases." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988) (footnote omitted). As another original commissioner explained, "[r]ather than being guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Breyer, 17 Hofstra L. Rev. at 19; *id.* at 23 ("[O]nce the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad").[7] Al-

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[7] Over time, these "trade-offs" have worked to substantially lengthen sentences. Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act.

(footnote continued on next page)

though the Commission may very well have done the best it could under the circumstances, it is abundantly clear that the ranges in that Manual are *not* the product of a balancing of the sentencing purposes every judge is required to consider under Section 3553(a)(2).

2. The Guidelines ranges do not account for important Section 3553(a) factors.

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines also fail to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider. Of particular note, they do not do so with respect to a vital component of subsection (a)(1)—the "history and characteristics of the defendant."

From the beginning, the Guidelines have produced sentencing ranges that take into account one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when

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(*footnote continued from previous page*)

Fifteen Year Report at 46, 47, and 49. As a result, the federal prison population has increased four-fold during that same period. *Compare* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988*, Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, D.C.: USGPO (1989) *with* Federal Bureau of Prisons, Quick Facts, *available at* http://www.bop.gov/news/quick.jsp#1. In fact, despite Congress's directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g), as of 2004 the federal prisons were 40% over capacity. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, *available at* http://ojp.usdoj.gov/-bjs/pub/pdf/p04.pdf.

deciding whether to impose a Guidelines sentence. These characteristics include, among others, family ties and obligations, USSG § 5H1.6, military service, *id.* at § 5H1.11, community good works, *id.*, addictions and other dependencies, *id.* at § 5H1.4, and duress relating to "personal financial difficulties and economic pressures upon a trade or business," *id.* at § 5K2.12. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is not surprising, because guidelines can only go so far in producing ranges that take these considerations into account. The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction, duress, or financial difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense. Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multi-

ple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[8] To the extent intent is considered, it works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (relevant conducts includes "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence"). In failing to differentiate between defendants based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1).

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[8] Several guideline provisions require rigid arithmetic increases for acts that were committed (including the resulting "harm") without regard to *mens rea*. For example, the Guideline for unlawful possession of a firearm, used in 10.6 percent of all federal criminal cases, *2005 Sourcebook* at 60, mandates a two-level increase if the firearm illegally possessed by the defendant "was stolen," and a four-level increase if it "had an altered or obliterated serial number," USSG § 2K2.1(b)(4), "whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number," *id.* at cmt. n.8(B). *See also id.* at § 2J1.2(b)(1)(B) (compelling the same twelve-level increase for defendants who know their false statements were made in connection with a terrorism investigation and those who were unaware of the nature of the investigation).

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines. Guidelines, at least in theory, enable judges to give the same weight to factors common to "categories" of defendants who commit the same crime in the same manner. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(d), (f). For example, all bank robbers start at a single base offense level. And, all other things being equal, the defendant who commits his offense in a more aggravated manner than others (such as injuring a teller during the robbery) is placed in a higher range. But in a number of ways the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors and circumstances (including the offense and offender factors mentioned above), have increased the second type of unwarranted disparity—the like treatment of cases that are not truly alike. Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. One of the biggest causes of *this* type of disparity is the practice

of charge and fact bargaining in connection with guilty pleas. Numerous studies have confirmed that because such bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different. For example Professor Stephen Schulhofer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety percent), *id.* at 1292. Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf.

Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing, *see, e.g.*, *Fifteen Year Report* at 24-25—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at

937.[9] The Justice Department's continued insistence after *Booker* that prosecutors avoid sentences outside the ranges that have been computed, and standards of review that treat non-Guidelines sentences as suspect, can only serve to perpetuate this form of disparity.

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness*' *built into the sentencing rules themselves.*" *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a ratio that substantially increased petitioner Claiborne's Guidelines range—and the career offender Guideline as rules that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be given a presumption of reasonableness.

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[9] Further aggravating the disparities inherent in plea bargaining is the existence of regional "'adaptations' to the guidelines system," including "fast-track" disposition programs. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.")

Congress recognized that judges would need to consider more than the kinds of unwarranted disparity against which Guidelines can protect. It thus required them to "consider" the problem of disparity, 18 U.S.C. § 3553(a)(6), *in addition to* consideration of the Guidelines range, in each individual case. The assumption that the Guidelines account for this and other Section 3553(a) factors thus cannot be squared with the structure of the statute, any more than it can be squared with the way the Guidelines have been created.

B. The History Of The Guideline Amendment Process Has Further Undermined Any Argument For A Presumption Of Reasonableness.

The second reason advanced by the Eighth Circuit in *Claiborne* for according within-Guidelines sentences a presumption of reasonableness was that the Guidelines have been refined over time based on several years of sentencing experience and studies. 439 F.3d at 481. While Congress, the Commission, and even this Court envisioned such a data-driven evolution of the Guidelines, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o), in practice the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines.

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions to the Manual. The Commission saw its original product as "but the first step in an evolutionary process." USSG ch. 1, pt. A(3) (1987). The Guidelines were to be refined along two fronts by: (1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the

Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263. Experience, however, has not measured up to expectations.

1. Changes to individual provisions have not addressed the failure of the Guidelines to account for and balance the multiple statutory purposes of sentencing.

The Commission's plan to incorporate the purposes of sentencing into later versions of the Guidelines Manual was doomed from the start. The tradeoffs stemming from the original commissioners' failure to reach consensus resulted in a system bereft of a coherent sentencing philosophy, much less one that bore some relationship to the purposes of sentencing set forth in the Sentencing Reform Act. "Without an agreement on the purposes of sentencing, there was no way for the Commission to measure sentences against particular objectives." *United States v. Jaber*, 362 F. Supp. 2d 365, 374 (D. Mass. 2005). The Commission has made a number of separate amendments to individual Guidelines, but it has yet to make the kind of structural changes needed to implement the statutory purposes of sentencing. In fact, the amendment process has been notable for its relentless addition of factors that serve to increase offense levels and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants.

The Guidelines have been amended 696 times. USSG App. C (2006). Only a handful of these changes have operated to decrease the length of certain sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(A)*, 30 Champion 32 at n.39 (2006) (identifying only seven such amendments: USSG App. C, amends. 396, 488,

515, 590, 624, 632, and 634). The cumulative effect of the remaining changes has been a "one-way upward ratchet" in sentencing, Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005), a result roundly criticized.[10]

This consistent increase in the length of prison sentences has not been accompanied by empirical data that tie the increases to the purposes of sentencing. *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular approaches or definitions adopted by the Commission; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors."). Even the criminal history provision—the single offender characteristic accounted for in the Guidelines—does not produce results that can be presumed "reasonable." Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its own

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[10] *See, e.g.*, *Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34; Judge Marvin Frankel, *Keynote Address: Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L. J. 2043, 2046 (1992) ("I think everyone here knows that the judges find the guidelines excessively harsh and rigid . . . . The guidelines are indeed severe . . . ."); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting at 4 (Aug. 9, 2003) ("The Federal Sentencing Guidelines should be revised downwards."), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

empirical studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf. Instead, it relied on a hodge-podge of preexisting tools, reasoning that their combined predictive power would transfer, "at least in part, to the nascent guidelines' criminal history measure." *Id.* The Commission intended to follow up with its own research to test the correlative value between its criminal history scoring system and recidivism. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 44 (1987).

The Commission conducted and publicized this promised analysis seventeen years later. *See Measuring Recidivism Report*. It demonstrates in quite compelling fashion that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism rates. *See id.* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[11] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[12]

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[11] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period), and marital status (31.4% for offenders who were never married versus 13.8% for married offenders and 19.5% for offenders who were formerly married). *Id.* at 12-14.

[12] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences

(*footnote continued on next page*)

2. The Sentencing Guidelines have not been refined to reflect developments in the sentencing "common law."

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has favored like treatment of dissimilar cases over a system that gives district judges the flexibility to take all factors into account. In the early years of Guidelines sentencing, judges began the dialogue envisioned by the original Commission by departing from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them. But, as one commentator recently noted, "the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guidelines range have come to be viewed as illegitimate, even deviant." Bowman, 43 Hous. L. Rev. at 321.

Contributing in no small part to this development was the Commission's reaction to the initial feedback it received from sentencing judges. At least three times during the early years of the Guidelines, the Commission adopted amendments that discouraged, or outright prohibited, departures in reaction to sentences imposed in one or two isolated cases. *See* Douglas A. Berman, *Distinguishing Offense Conduct and*

(*footnote continued from previous page*)

for "certain economic crimes," USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf., the Guidelines have not been amended to do so.

Offender Characteristics in Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the 1991 amendment to § 5H1.4, which discourages departures based on "[p]hysical condition or appearance," to *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), and the 1992 addition of § 5H1.12, which prohibits departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

The Commission has also tried to impose uniformity in situations where the rate of downward departures reflects the view that a particular Guidelines range often calls for a sentence greater than necessary to serve the purposes of sentencing. Instead of giving judges greater flexibility to take into account the factors motivating downward departures, the Commission has reacted by severely curtailing—or eliminating altogether—sentence reductions based on the cited factor. For instance, the high rate of downward departures in career offender cases has long been a symptom of the shortcomings in that Guideline. U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* (Mar. 2006) ("*March 2006 Booker Report*") at 137 (showing non-government-sponsored downward departures in 10% of cases between October 2002 and April 2003). Part of the explanation is that the Commission's expansive definition of predicate "crimes of violence" equates defendants with truly violent histories and those who have com-

mitted much less serious offenses.[13] The Commission responded to these frequent downward departures from the career offender guideline by severely and categorically limiting their magnitude. USSG App. C, amend 651 (2003) (adding USSG § 4A1.3(b)(3)(A), which limits downward departures based on overstatement of the criminal history of career offenders to a single criminal history category). As a result, district judges continue to find it necessary to sentence below the Guidelines range in a significant number of career offender cases. *See March 2006 Booker Report* at 137 (showing sentences imposed below the career offender Guidelines range, without government sponsorship for such a variance, in 21.5 percent of cases).

The problem lies not in the Commission's failure to produce Guidelines ranges that presumably account for all of Section 3553(a)'s factors and purposes in any given case; the problem lies in the unrealistic expectation that a system of detailed guidelines such as those the Commission promulgated is *capable* of doing so. In any given sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess

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[13] The list of "crimes of violence" treated on the same level as murder, rape and armed robbery includes tampering with a motor vehicle, *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); driving while intoxicated, *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc); fleeing and eluding, *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006); mere possession of a short-barreled shotgun, *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005); operating a motor vehicle without the owner's consent, *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005); failing to return to a halfway house, *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002); car theft, *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002); burglary of a non-dwelling, *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); and oral threatening, *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is inherently incapable of producing a presumptively accurate "answer," however, because such a computation cannot take into account much of the input necessary to the process.

As a result of the inherent limitations of any guidelines system, and the demonstrated limitations of the one in place, a reviewing court should not presume that a Guidelines sentence is reasonable, much less should it require extraordinary circumstances to impose a sentence that varies substantially from the Guidelines.

III. Reasonableness Review Must Operate Without Giving The Guidelines Range Special Weight.

In clarifying "review for reasonableness," this Court and the courts of appeals must avoid characterizations that give the Guidelines any greater weight or prominence than other sentencing factors. In light of the *Booker* remedy for the Sixth Amendment defect in the Guidelines, the sentence that a judge is permitted to impose must not be dependent upon whether it is in close proximity to the Guidelines range. With Section 3553(b)(1) excised, the statute places no special weight on the Guidelines, a result also consistent with the fact that the Guidelines do not—and cannot—produce sentence ranges that take account of each factor and purpose a judge is required by law to consider.

District judges, free of the duty to give the Guidelines special prominence, will regain the ability to follow Section 3553(a)'s directive to take into account *all* of the statutory factors on a case-by-case basis, in order to arrive at a sentence "sufficient," yet "not greater than necessary," to achieve each statutory purpose of sentencing. In circuits that continue to give the Guidelines special status, district judges are unable to carry out this duty. Instead, as was the case

when Section 3553(b)(1) remained in effect, the courts of appeals frequently reverse below-Guidelines sentences because the district judge relied on a factor that failed to meet the test for downward departures. *See United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were first promulgated as binding directives. This Court then recognized the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another. *Koon*, 518 U.S. at 98 (1996) (explaining that district courts "see so many more Guidelines cases than appellate courts do"). "[T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

By giving the Guidelines special, nearly conclusive, weight, the courts of appeals have deprived district judges of the opportunity to decide the appropriate weight of that factor on a case-by-case basis, informed by their institutional advantage in evaluating the full mix of sentencing factors presented in each particular case. In some instances, the judge will find it appropriate to give the Guidelines significant weight be-

cause the other factors point to the same result. In other cases, the judge will determine that the Guidelines should be given little weight because other important factors point to a different result, a sentence that may be either higher or lower than the Guidelines range. To say that courts should "presume" the other factors will align with the Guidelines is—to put a twist on Justice Scalia's analogy—as useful as presuming that the use of a large amount of one ingredient in every recipe will result in an appetizing dish.[14] The mix of other factors present in each case will dictate the degree to which the court should rely on the Guidelines; a presumption is not useful when the mix of those factors can and will vary from one case to the next. "Importantly, there is no assumption here that a guidelines sentence complies with the purposes of the sentencing statute. Instead, that compliance must be tested by consideration of the multiple factors set forth in the sentencing statute, with particular attention to the factors identified by the parties in their arguments." *Jiménez-Beltre*, 440 F.3d at 526 (Lipez, J. dissenting).

For district judges to exercise their traditional sentencing discretion, consistent with both the Sentencing Reform Act and the Sixth Amendment, they must be able to consider each sentencing factor, along with the various purposes of sentencing, unhampered by artificial presumptions about the reasonableness of a within-Guidelines sentence.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with the limited role the Sentencing Guidelines may play after *United States v. Booker*.

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[14] Justice Scalia criticized the majority's selective excision of provisions from the Act, concluding it "is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." *Booker*, 543 U.S. at 307 (Scalia, J., dissenting).

Respectfully submitted.

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No. 06-5754

IN THE

Supreme Court of the United States

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Circuit's standard of appellate review has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *United States* v. *Booker*, 543 U.S. 220 (2005).

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IN THE

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BRIEF FOR AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND VETERANS FOR AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The National Veterans Legal Services Program is an independent, nonprofit, veterans' service organization dedicated to ensuring that the United States government honors its commitment to our veterans by providing them with the federal benefits they have earned through their service to our country. Veterans for America is a nonprofit advocacy

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

and humanitarian organization that unites the newest generation of military veterans with those from past wars to advance policies favorable to veterans and elevate public discourse regarding the causes, the conduct, and, particularly, the consequences of war.

Amici submit this brief to express their common concern about the particularly harsh consequences of the decision below for Amici's core constituencies—United States military veterans. The Sentencing Commission turned its back on veterans, both by constraining the ability of sentencing judges to account for physical and mental infirmities that disproportionately afflict veterans and by providing that a record of honorable military service is typically irrelevant at sentencing. The men and women who have served our country honorably, especially in combat theaters, often pay tremendous physical and emotional costs for doing so. The toll for frequent deployments to battle zones such as Vietnam, Iraq, and Afghanistan all too often comes due in a veteran's unfortunate involvement with the criminal justice system. The Court should free sentencing judges to consider the service of veterans such as Victor Rita to this country, as well as the physical and mental consequences of that service. That cannot happen so long as Guidelines sentences are considered "presumptively reasonable" on appeal.

INTRODUCTION AND SUMMARY

As petitioner explains, the Sixth Amendment principles recognized in *United States* v. *Booker*, 543 U.S. 220 (2005), prohibit the federal courts from treating harsh criminal sentences as presumptively reasonable simply because they fall within the levels that would be permitted by the Sentencing Guidelines if they were still mandatory. In this brief, we address the special significance of that issue to our Nation's military veterans, such as petitioner Victor Rita.

The Guidelines disserve veterans in two basic respects. *First*, they unduly constrain the discretion of sentencing courts to reduce sentences to account for mental and physical problems that, although they afflict a great variety of

Americans, disproportionately afflict veterans. For example, even though Congress has directed sentencing courts to consider whether prison time would deny a defendant "needed ... medical care," 18 U.S.C. § 3553(a), the Guidelines restrict a defendant's ability to argue that the court should spare him from prison time on the ground that a prison environment would exacerbate his condition and deprive him of the medical treatment he needs. Similarly, military experiences can cause a range of long-term mental illnesses, such as post-traumatic stress disorder and chronic depression, that may be relevant to a defendant's culpability for his conduct. But the Guidelines constrain the circumstances in which a defendant is free to argue that mental illness diminished his culpability and thus warrants leniency in sentencing.

These constraints on a court's sentencing discretion are inappropriate in any context, whether the defendant is a veteran or not. But their disproportionate impact on combat veterans is particularly unjustified, given that many of them sacrificed their mental health in the service of our country.

Second, the Guidelines disserve veterans by discouraging a sentencing judge from taking into account, among the mix of factors relevant to each sentencing decision, the moral weight of a veteran's contributions to society through his or her military service. Shortly after the Sentencing Guidelines were introduced, a federal court granted a downward departure to a highly decorated Marine Corps veteran convicted of mail theft. *United States* v. *Pipich*, 688 F. Supp. 191 (D. Md. 1988). As that court explained, "[a]n exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice" and, depending on the circumstances, should qualify as "a mitigating factor that warrants departure from" the Guidelines. *Id.* at 193.

The Sentencing Commission responded to that decision (and the decisions that cited it, all with approval) by issuing a Policy Statement that "[m]ilitary ... service," among other

good works, is "not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.11. The Commission offered no explanation for stripping the district courts of discretion to grant a defendant some leniency because of particularly honorable contributions to our national welfare.

In sum, Guidelines sentences, at least as applied to military veterans, are not "presumptively reasonable," and they should not be treated as such either by sentencing judges or by appellate courts on review.

ARGUMENT

I. THE GUIDELINES UNLAWFULLY RESTRICT THE ROLE THAT MENTAL AND PHYSICAL INFIRMITIES MAY PLAY AT SENTENCING AND THUS SYSTEMATICALLY DISADVANTAGE VETERANS

The Guidelines generally forbid consideration of mental illness as a reason for a downward departure, USSG § 5H1.3, unless that mental illness is "significant[]" and itself "contributed substantially to the commission of the offense," USSG § 5K2.13.[2] This formulation produces two unfortunate results. First, contrary to Section 3553(a)(2)(D), the Guidelines discourage courts from taking individuals' psychiatric needs into account for incarceration purposes. Second, they unduly constrain judges from taking mental illness into account in assessing culpability.

A. The Guidelines Violate Section 3553(a)(2)(D) By Constraining Judges From Considering Defendants' Mental Health Needs At Sentencing

Section 3553(a) requires the sentencing court to "consider ... the need for the sentence imposed ... to provide the defendant with needed ... medical care[] or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). That statutory imperative means that,

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[2] Even where those conditions are met, the Guidelines forbid courts from departing downwards where the mental impairment was intoxicant-induced or where the defendant must be incarcerated to "protect the public." *Id.* We do not address these additional limitations in this brief.

where possible, sentences should accommodate the needs of defendants whose medical conditions cannot be treated as effectively in prison as elsewhere. *See United States* v. *Duhon*, 440 F.3d 711, 715 (5th Cir.), *pet. for cert. filed* (U.S. May 18, 2006) (No. 05-1114) (district court's conclusion that defendant's "psychiatric rehabilitation would be best served with a probationary sentence that would allow him to continue treatment with his current psychologist . . . was consistent with subsection (2)(D)'s mandate to consider the need to provide the defendant with medical care in the most effective manner"); *United States* v. *Pallowick*, 364 F. Supp. 2d 923, 930 (E.D. Wis. 2005) (evaluating mental illness directly under Section 3553(a)(2)(D) and, in sentencing defendant to below-Guidelines period of incarceration, "conclud[ing] that sending defendant to prison for a lengthy period of time would not aid in his rehabilitation and might actually hinder the progress he made in counseling").

The Sentencing Guidelines thwart this statutory objective. They provide that while "[m]ental and emotional conditions" may be taken into account in crafting add-on conditions for probation or supervised release, they "are not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.3. Notably, the Guidelines' mental illness formulation lacks even the carve-out for "extraordinary . . . impairment" that courts may consider with respect to physical infirmities. *See* USSG § 5H1.4 (departure on account of physical condition may be reasonable, "e.g., in the case of a seriously infirm defendant, [where] home detention may be as efficient as, and less costly than, imprisonment").[3] Because the Guidelines thus discourage consideration of

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[3] Veterans—especially combat veterans like petitioner Rita—obviously are more likely to suffer from physical impairments than non-veterans. And they are dramatically more likely to suffer from the types of serious impairments, such as missing limbs, that could render them particularly vulnerable in a prison environment. There is no principled reason to limit downward departures for physical infirmities to those that are "extraordinary," and generally only to cases where alternative punishment would be less costly than imprisonment. *See* USSG § 5H1.4.

whether mentally ill defendants will receive continued medical treatment "in the most effective manner," they contravene Section 3553(a).

Indeed, Department of Justice reports make clear that federal inmates are unlikely to receive proper psychiatric care. According to the Bureau of Justice Statistics (BJS), only 24 percent of federal prison inmates with mental health problems receive any sort of mental health treatment at any point during their incarceration. *See* U.S. DOJ, BJS, *Mental Health Problems of Prison and Jail Inmates*, 9, Table 14 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Moreover, as recently as 1997 (the most current data evaluated by the BJS in this respect), fewer than 60 percent of the most seriously mentally ill federal inmates had "[r]eceived any mental health service" since admission. *See* U.S. DOJ, BJS, *Mental Health and Treatment of Inmates and Probationers*, 9, Table 14 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf.

Imprisoned military veterans are disproportionately likely to suffer from mental illness—and thus to be harmed by the Guidelines' disregard of Section 3553(a)(2)(D). According to the most recent edition of "Veterans in Prison or Jail," a BJS "Special Report," 13.2 percent of veterans in federal prison in 1997 were among the most seriously mentally ill (as compared to 6.4 percent of nonveteran federal inmates). *See* U.S. DOJ, BJS, *Veterans in Prison or Jail*, 12, Table 15 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf (citing *Mental Health and Treatment of Inmates and Probationers*). The report also shows that state-prisoner veterans who saw combat were 21 percent more likely than those who did not to be mentally ill, *id.* at 12, and honorably discharged veterans were 16 percent more likely than other veterans in state prison to be mentally ill, *id.* at 13.[4]

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[4] The report does not provide equivalent breakdowns among veterans in federal prisons.

The Bureau of Prisons' disregard of mental health needs stands in stark contrast to the extensive and targeted care that the Veterans Health Administration makes available to veterans outside of prison. *See generally* Health Care—Veterans Health Administration, Clinical Programs & Initiatives, http://www1.va.gov/health/clinical.html. Veterans, especially combat veterans, tend to suffer disproportionately from a well-defined set of diseases such as post-traumatic stress disorder ("PTSD") and severe depression. *See* Hankin et al., *Mental Disorders and Mental Health Treatment Among U.S. Department of Veterans Affairs Outpatients: The Veterans Health Study*, Am. J. Psychiatry 156:1924, 1925, 1929 (Dec. 1999), *available at* http://ajp.psychiatryonline.org/cgi/reprint/156/12/1924 ("depression [and] posttraumatic stress disorder . . . are debilitating conditions and are prevalent among VA patients[,]" and "screening rates of depression and PTSD are higher than rates found among comparably aged patients in primary care in the private sect[or]" (citations omitted)); Fontana et al., *The Long Journey Home XIV: Treatment of Posttraumatic Stress Disorder in the Department of Veterans Affairs: Fiscal Year 2005 Service Delivery and Performance* (Mar. 2006), at 1, *available at* http://www.nepec.org/PTSD/ptsLJHaE.pdf ("For many thousands of veterans, PTSD is a chronic disorder resulting directly from their military service that causes substantial psychological suffering and social disability").

The Veteran's Health Administration has more experience treating these diseases—and has had more success at it—than any other provider. *Long Journey Home XIV* at 1 ("The national network of specialized PTSD programs that has been established by VA is unique in the world[,]" and "[s]tudies have shown that veterans are very well pleased with the services received, significantly more so than they are with services from nonspecialized psychiatry programs" (citations omitted)). Successful treatment of PTSD and depression correlate to reduced violent criminal activity. *Cf.* Zeller, *PTSD, Substance Abuse, and Violence Among Combat Veterans* (July 2004), at 3, *available at*

http://wwwlib.umi.com/dissertations/preview_page/3150358/20#top ("findings suggest that veterans who report more reexperiencing symptoms . . . exhibit more severe levels of . . . violence when compared to non-PTSD diagnosed veterans" (citations omitted)). The earlier treatment is initiated, however, the more likely it is to be successful. *See* James, *A Transitional Day Treatment Program for Soldiers with Severe Post Traumatic Stress Disorder* 11 (2002), *available at* http://wwwlib.umi.com/dissertations/preview_page/3057614/23#top ("One of the key components to PTSD recovery seems to be early diagnosis and intervention. . . . The earlier that soldiers with PTSD [are] identified and treated, the better [] their chances of recovery" (citations omitted)).

Imprisoning veterans who suffer from these diseases thus directly increases their risk of recidivism by cutting them off from the first-in-class treatment available at the VA.[5] And their odds of receiving *any* treatment from the Bureau of Prisons are likely worse than a coin-flip.

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[5] There is some evidence that veterans, as a class, pose a substantially lower recidivism risk than other individuals convicted of crimes. In 1993, the New York Department of Correctional Services ("NYDCS") performed a study to measure the effectiveness at reducing recidivism of two pre-release intervention programs for veterans. State of New York, Dep't of Correctional Servs., *Veterans' Program Follow-up* (July 1993), *abstract available at* http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419 (study on file at NYDCS). The study included "two comparison populations: 1) Non-Veteran Releases in the release years studied (N=68,587), and 2) Veteran Releases with no reported participation in a veterans' program (N=5,538)." *Id.* at 3. Comparing these two large control groups against each other shows that veterans who have not participated in any pre-release intervention program return to the NYDCS system at less than 80 percent of the rate at which similarly situated nonveterans return. *See id.*, Appendix 1. Similarly, the BJS's report on incarcerated veterans indicates that such veterans earn, on average, significantly more "good time" than nonveterans, *see Veterans in Prison or Jail*, 8 Table 8; 18 U.S.C. § 3624, and thus suggests that veterans, on average, are rehabilitated faster than nonveterans.

B. Mental Illness That Affects Culpability Should Be A Mitigating Factor In Sentencing, Even If It Was Not A Proximate Cause Of The Criminal Act

Mental illness is relevant to sentencing not just because prison environments tend to exacerbate mental problems, but also because sentencing judges traditionally had great discretion to take mental illness into account in assessing a defendant's culpability for his conduct. The Guidelines constrain that discretion by providing that mental illness can justify a downward departure under USSG § 5K2.13 only if the illness "contributed substantially to the commission of the offense." *Id.* Some, but not all, courts have construed this provision narrowly—to foreclose, for example, downward departures for individuals whose mental illnesses led them to the desperate straits from which they committed the crime, but did not directly cause the crime itself. *See, e.g., United States* v. *Carucci*, 33 F. Supp. 2d 302, 303 (S.D.N.Y. 1999) (rejecting downward departure under USSG § 5K2.13 because "a compulsive gambler is not, *a fortiori*, a compulsive illegal trader");[6] *cf. United States* v. *Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000) ("§ 5K2.13 does not require a direct casual link between the [significantly reduced mental capacity] and the crime charged").

To the extent the Guidelines narrow the circumstances in which mental illness may serve as a basis for sentencing leniency, they arbitrarily confine the traditional discretion of sentencing courts to take relevant mitigating factors into

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[6] This approach has contributed to the imprisonment of a disproportionately high number of individuals suffering from mental health problems. For example, the BJS has calculated that, "[a]t midyear 2005 . . . 45% of Federal prisoners" had at least one "mental health problem." *Mental Health Problems of Prison and Jail Inmates* at 1. That figure compares to "an estimated 11% of the U.S. population age 18 or older" who met a similarly broad measure of "mental health disorders." *Id.* at 3. When considering only the most seriously mentally ill—where estimates for the adult U.S. population typically run between 1 and 5 percent—the BJS has calculated that 7.4 percent of federal prisoners are mentally ill. *See Mental Health and Treatment of Inmates and Probationers* at 1-2.

account. Indeed, the Sentencing Commission's adoption of USSG § 5H1.3 "represented a major change in course in criminal law, as it devalued the importance of *mens rea*—an element that had been an important factor in sentencing for more than a century." *United States* v. *Shore*, 143 F. Supp. 2d 74, 78 (D. Mass. 2001). This arbitrary constraint on sentencing discretion is particularly unfair to veterans, and not just because veterans are disproportionately likely to suffer from mental illness in the first place. It is also unfair because a veteran's mental illness is often attributable to combat experiences sustained in the service of this country.

II. THE GUIDELINES ARBITRARILY EXCLUDE PARTICULARLY HONORABLE MILITARY SERVICE AS A DISCRETIONARY BASIS FOR IMPOSING A SENTENCE BELOW THE APPLICABLE GUIDELINES RANGE

Veterans have performed one of the highest—and, in the case of combat veterans, one of the most dangerous—acts of citizenship. As Congress and the courts have recognized, that service entitles veterans to special consideration in a variety of contexts.[7] The Sentencing Commission abandoned that traditional policy, and arbitrarily constrained the longstanding discretion of sentencing courts, by providing that "[m]ilitary . . . service," among other good works, is "not ordinarily relevant in determining whether a departure is warranted." USSG § 5H1.11. The Sentencing Commission offered no explanation for that unfortunate decision. *See* 56 Fed. Reg. 22762, 22779-80 (May 16, 1991).

Congress has provided that "the history and characteristics of the defendant" should inform what is the "just pun-

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[7] Congress has made clear the esteem in which it holds veterans in legislation addressing topics ranging from employment, 5 U.S.C. § 3309, to naturalization, 8 U.S.C. §§ 1439, 1440, to education, 38 U.S.C. §§ 3001 *et seq.*, to medical care, *id.* §§ 1701 *et seq.*, to housing and small business loans, *id.* §§ 3701 *et seq.* We are not aware of any context in which Congress has legislated that a veteran seeking favorable treatment may not at least argue that such grace is supported by his or her service record. The Sentencing Commission thus broke dubious new ground when it adopted USSG § 5H1.11 (discussed in the text).

ishment for the offense." 18 U.S.C. § 3553(a). As the Court explained in *Koon* v. *United States*, 518 U.S. 81 (1996), "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 113; *see also id.* at 98 ("A district court's decision to depart from the Guidelines ... will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." (citing *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989))).

Both before and after adoption of the Sentencing Guidelines, courts recognized that, at times, individuals who have served this country in the military, especially when they have done so in combat, deserve the benefit of the doubt at sentencing. For example, in the leading Guidelines-era case to address the relevance of military service as a ground for departure before the Sentencing Commission addressed the issue by adopting USSG § 5H1.11, the sentencing court explained that

> a person's military record is a relevant factor to be considered at sentencing, because it reflects the nature and extent of that person's performance of one of the highest duties of citizenship. An exemplary military record ... demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence....
>
> In ignoring a defendant's military service record, the Commission has done a disservice (albeit unintentional) to those ex-service men and women who have served their country faithfully in time of

> war or other need, and who later find themselves brought before a federal court on criminal charges.

Pipich, 688 F. Supp. at 193.

The *Pipich* court's consideration of the defendant's military record was consistent with the general rule of statutory interpretation that "interpretative doubt[s]" in veterans' benefits statutes should "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (citation omitted).[8] Indeed, where veterans could benefit from a veterans' benefits statute, the "statute should not be read restrictively to bar [them] unless it is expressly commanded." *United States* v. *Convento*, 336 F.2d 954, 955 (D.C. Cir. 1964). And as courts have recognized in similar contexts, military veterans are entitled to full consideration of their individual service records before they are denied grace. *Yuen Jung* v. *Barber*, 184 F.2d 491, 497 (9th Cir. 1950) (military veteran seeking "matter of grace . . . should not be finally rejected without making sure that he has not shown himself worthy of what Congress intended the servicemen described in the Act to have").

Accordingly, before the Commission effectively overruled *Pipich* by adding USSG § 5H1.11, courts subjected defendants' military records to meaningful review and made departure decisions on the basis of a given veteran's specific contributions. For example, the *Pipich* court granted a downward departure to a defendant who had received dozens of medals for his service in Vietnam, 688 F. Supp. at 192-193, while the Eighth Circuit found a "military enlistment consisting of eleven years of duty within the continental United States, mainly as a recruiter" insufficient to support a downward departure, *United States* v. *Neil*, 903 F.2d 564, 566 (8th Cir. 1990). Returning to such a model now that the Guidelines are advisory would at least allow each veteran to

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[8] The Court has recognized that Congress understands this interpretive principle. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991).

argue his or her own service record to a sentencing judge. That right would be important to petitioner Rita, for example, as his 24 years service in the Marine Corps included highly decorated combat service in both Vietnam and the Persian Gulf. 4th Cir. Appellant Br. 12. There is nothing reasonable about the Guidelines' suppression of such distinguished service as a basis for reducing a veteran's sentence below the Guidelines range.

In sum, an individual military veteran's service record, as well as any mental or physical injuries lingering from his service, are sentencing factors properly considered under Section 3553(a). They will not counsel below-Guidelines sentences for all veterans, but all veterans should be permitted to make their arguments to unconstrained judges.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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VICTOR A. RITA, JR.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL has an interest in this case insofar as it will determine whether within-guidelines sentences are presumptively reasonable and whether federal criminal defendants receive the full benefit of the individualized sentencing process required by Congress in the Sentencing Reform Act and this Court in *United States v. Booker*, 543 U.S. 220 (2005). We believe that it is imperative to the protection of our clients' rights and to the establishment of a more just sentencing system that courts of appeals consider all of the factors enumerated in 18 U.S.C. § 3553(a) when reviewing sentences for unreasonableness. Review of all of the statutory factors is necessary to ensure that district courts give reasoned consideration to each individual defendant's circumstances when "impos[ing] a sentence sufficient, but not greater than

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

necessary" to comply with the statutory purposes of sentencing.

To assist this Court, NYCDL has undertaken an analysis of all post-*Booker* reasonableness review cases captured by its search terms (described in the appendix attached hereto ("App.")), from January 1, 2006 through November 16, 2006.[2] The complete results of NYCDL's work should help this Court appreciate the ways in which reasonableness review has been applied by the courts of appeals. The data suggest that all the courts of appeals—and especially those explicitly applying a presumption that within-guidelines sentences are reasonable—have failed to follow the parsimony command Congress set forth in Section 3553(a).[3]

SUMMARY OF ARGUMENT

In *Booker*, this Court developed a remedy for constitutional problems with the operation of the Sentencing Reform Act: It held that Section 3553(a) governs both district courts' sentencing decisions and appellate review of those decisions. Congress has directed district courts to consider all seven factors enumerated in Section 3553(a), not just the guidelines. In *Booker*, this Court instructed the circuits to review sentences for unreasonableness, guided by *all* of the factors listed in the statute. 543 U.S. at 261 (appellate courts are to assess unreasonableness "with regard to § 3553(a)").

When *Booker* was decided, "no one kn[ew] ... how advisory Guidelines and 'unreasonableness' review w[ould] function in practice." 543 U.S. at 311 (Scalia, J., dissenting

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[2] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve unreasonableness review, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*. The end date is shortly after this Court granted certiorari in this case. *See* App. at 1a n.1. NYCDL's appendix is also available at http://www.nycdl.org.

[3] This brief focuses principally on the second question presented.

in part). In the almost two years since *Booker*, the courts of appeals appear to have created their own distinctive *de jure* and *de facto* standards of review, which find no basis in Congress's statutory text and are entirely inconsistent with the parsimony provision of Section 3553(a).

NYCDL's findings reveal that the courts of appeals are universally affirming within-guidelines sentences. NYCDL discovered that *only one* within-guidelines sentence has been reversed as substantively unreasonable in at least 1,152 appeals. *See* App. at 3a. Sentences outside the advisory-guidelines range, however, receive inconsistent treatment in favor of higher sentences. The courts have been deferential to above-guidelines sentences, but have collectively disfavored below-guidelines sentences appealed by the government. In those circuits formally applying a presumption of reasonableness nearly every below-guidelines sentence appealed by the government has been reversed.

The results of reasonableness review are especially telling in the Fourth Circuit, from which this case arises.[4] For example, the court affirmed all 201 within-guidelines sentences appealed. *See* App. at 3a-4a, 43a-71a. Nine of ten above-guidelines sentences appealed by defendants were affirmed as reasonable (including some sentences in which the district court doubled and tripled the term of imprisonment relative to the guidelines range). *See* App. at 4a, 39a-40a. Yet all of the nine below-guidelines sentences appealed by the government were found unreasonable and reversed (including some sentences only modestly below the guidelines). *See* App. at 4a, 42a-43a.

These patterns, which strongly suggest that courts are not applying review for unreasonableness in a manner consistent with Section 3553(a), especially the parsimony provision, likely result from two errors: (1) a general failure

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[4] The data from the Eighth Circuit are similar, as discussed in Brief of New York Council of Defense Lawyers, as Amicus Curiae Supporting Petitioner, *Claiborne v. United States*, No. 06-5618 (2006).

to attend to the words Congress used in Section 3553(a) and (2) a mistaken assumption that the guidelines incorporate all of the required Section 3553(a) considerations.

First, the plain language of Section 3553(a) requires a district court to "impose a sentence sufficient, but not greater than necessary to comply with the purposes of" sentencing set forth in Section 3553(a)(2), while "consider[ing]" seven specified factors, only one of which is the guidelines range. Very few courts of appeals have even mentioned this parsimony provision when reversing below-guidelines sentences and when affirming above-guidelines sentences. Moreover, the plain language does not contemplate—or leave room for—the extra-textual presumption adopted by the courts of appeals to consistently affirm within-guidelines sentences. *Cf. Koon v. United States*, 518 U.S. 81, 108 (1996) (explaining that "[s]o long as the overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied") (quoting § 3553(a)).

Second, courts have wrongly assumed that the guidelines account for all of the other Section 3553(a) factors. But while the courts stress that the U.S. Sentencing Commission has studied and revised the guidelines for eighteen years, they have ignored the Commission's own declaration following its comprehensive study that "the reformed sentencing system has fallen short of th[e] ideal in several respects" and has failed to fully achieve "the goals of sentence reform." U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment Of How Well The Federal Criminal Justice System Is Achieving The Goals Of Sentencing Reform 144 (2004) ("USSC Assessment Report"). The Commission has expressly and repeatedly found that, in many circumstances, the guidelines are not parsimonious and do not serve the goals set forth in Section 3553(a)(2).

ARGUMENT

The plain language of Section 3553(a) does not support a presumption of reasonableness for within-guidelines

sentences and the Commission's own analysis undermines the basis for any presumption. Nevertheless, the data in our empirical study reveal that the courts of appeals are operating as if the guidelines fulfill the mandates of Section 3553(a). The consequences of these errors reinforce the conclusion that the courts of appeals have misunderstood and misapplied this Court's remedy in *Booker*, including its directive that "Section 3553(a) ... sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts ... in determining whether a sentence is reasonable." *Id.* at 261.

I. THE EMPIRICAL DATA REVEAL NON-PARSIMONIOUS PATTERNS IN THE APPLICATION OF REASONABLENESS REVIEW

The analysis conducted by NYCDL incorporated 1,152 within-guidelines sentences appealed by defendants. *See* App. at 2a-3a. These sentences were affirmed in 1,136 cases and vacated in only 16 cases. *Id.* at 3. Moreover, 15 of the sentences were vacated for *procedural* reasons—that is, the court of appeals held that the district court did not adequately explain its reasons for the sentence imposed and therefore adequate appellate review was not possible. *Id.* Only one sentence out of 1,152 within-guidelines sentences challenged on appeal for reasonableness has been found to be substantively unreasonable. *Id.* at 3a, 156a.

The Commission has in its reports, discussed *infra*, repeatedly stated that sentences recommended by the guidelines in many classes of cases are often greater than necessary to achieve the sentencing purposes Congress described in Section 3553(a)(2). The Commission's findings should prompt suspicion about an appellate pattern in which less than .08% of appealed within-guidelines sentences are reversed as substantively unreasonable.

Moreover, if the guidelines are truly viewed as a benchmark of reasonableness by the courts of appeals, even though the Commission itself does not espouse this view, *see generally* USSC Assessment Report, one would expect

those courts to be *equally* concerned about variances above the guidelines range *and* those that vary below the range. But the pattern of appellate review tells a different story.

NYCDL's study included 154 above-guidelines sentences appealed by defendants arguing that the sentence was unreasonable. Only seven of these sentences were found to be unreasonable. *See* App. at 2a. But, the courts of appeals have been far less deferential, and nearly intolerant, when a district court exercises its discretion to impose a below-guidelines sentence. The government has appealed 71 below-guidelines sentences and achieved *60* reversals. *Id.*[5]

NYCDL's study also reveals that the formal adoption of a presumption of reasonableness for within-guidelines sentences seems to affect the review of even those sentences not within the guidelines. In the circuits that have formally adopted this presumption, there were 51 below-guidelines sentences appealed by the government. *Forty-seven* of these sentences were vacated as unreasonable. *Id.* at 3a. In those circuits not formally invoking a presumption, the government has prevailed in 13 of its 20 appeals. *Id.*[6]

The reasonableness review outcomes are especially non-parsimonious in some circuits. In the First, Fourth, and Fifth Circuits, the government has been successful in all of

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[5] Although it is likely that the government is somewhat more selective in its appeals, the stark difference between the findings for above- and below-guidelines sentences suggests that selectivity cannot explain everything.

[6] Additionally, below-guidelines sentences have proved immune from reversal when a *defendant* appeals (0 reversals despite 138 appeals, App. at 2a), and some courts appear to have suggested that in these circumstances, defendants have nothing legitimate to complain about. *See, e.g., United States v. Griffin*, 187 Fed. Appx. 13, at *3 (1st Cir. 2006) (rejecting defendant's argument for a lower sentence because "a sentence below the guideline range ... suggests mitigating factors are already at work"); *United States v. Peyla*, 2006 WL 3610113, at *2 (7th Cir. 2006) (finding "nothing unreasonable" about a sentence that was already one month below the guidelines range).

its below-guidelines sentence appeals. *Id.* at 5a-6a (First Circuit, 4/4; Fourth Circuit, 9/9; Fifth Circuit, 5/5). In the Second, Third, Seventh, Tenth, and Eleventh Circuits, no defendant has successfully challenged an above-guidelines sentence as unreasonable. *Id.* at 5-6 (Second: 0/6; Third: 0/10; Seventh: 0/8; Tenth: 0/8; Eleventh: 0/23). The pattern in the Eighth Circuit exemplifies how far the circuits have strayed from the statute: there, only one of 22 above-guidelines sentences appealed by defendants has been reversed, in stark contrast to the *27 of 28* below-guidelines sentences appealed by the government that have been vacated as unreasonable. *Id.* at 4a, 132a-34a, 137a-41a.

The message that emerges from this pattern of appellate review is one that discourages district courts from the exercise of thoughtful discretion in service to the full range of considerations Congress articulated in Section 3553(a).[7] The influence of the circuits' singular focus on the guidelines is illustrated by cases like Mr. Rita's where substantial evidence is presented regarding the particular defendant's circumstances indicating that a sentence below the guidelines range would be "sufficient, but not greater than necessary," to achieve congressional sentencing purposes. Mr. Rita was a decorated veteran who served in the Vietnam and Gulf Wars; suffers from serious health problems due to exposure to Agent Orange and an injury suffered in military service; and made a strong showing that he would likely be the target of prison violence due to his lengthy civilian government service including as an immigration officer and investigator for the Department of Homeland Security. Petition for Writ of Certiorari, *United*

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[7] NYCDL's findings may underestimate the non-parsimonious impact of the courts of appeals reasonableness review. These numbers do not capture those within-guidelines sentences that were not appealed, or the significant number of appeals that continue to challenge *only* the guidelines calculation. *E.g.*, *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1130 (10th Cir. 2006) ("Mr. Hernandez-Castillo does not challenge the reasonableness of the sentence imposed by the district court.").

States v. Rita at 13-16, No. 06-5754 (2006). Surely these facts provide a sound basis under Section 3553(a) for a sentence below the nearly three-years' imprisonment suggested by the guidelines. But the district judge and court of appeals, drawn to the anchors provided by the guidelines, rotely opted for a guidelines sentence without any clear justification other than that it was a guidelines sentence.

A presumption in favor of guidelines sentencing, and the actual results of that presumption, necessarily pressure district courts—especially in close cases—toward imposing within-guidelines sentences to avoid the risk of reversal. It is therefore not surprising that the Commission's latest data show that, as the guideline-centric patterns and rulings have emerged from the courts of appeals, district judges over the last six months have less frequently sentenced outside of the guidelines. U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006. The message sent is clear when the courts of appeals affirm nearly all within- and above-guidelines sentences and reverse most below-guidelines sentences.[8] The signal is to employ less discretion, except if imposing a higher sentence—which is precisely the *opposite* of what the parsimony provision of Section 3553(a) expressly requires.

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[8] The circuits not expressly adopting a presumption have still made clear to district courts that sentences within the guidelines range will ordinarily be affirmed. *See, e.g., See United States v. Pelletier*, 2006 U.S. App. LEXIS 29214, at *26-27 (1st Cir. 2006) ("[A] defendant who attempts to brand a within-the-range sentence as unreasonable must carry a heavy burden."); *United States v. Fernandez*, 443 F.3d 20, 27 (2d Cir. 2006) ("We recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances."); *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) ("[A] within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range ...."); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) ("[O]rdinarily we would expect a sentence within the Guidelines range to be reasonable.").

See, e.g., United States v. Hartley, CR No. 2:06-00017, Tr. 7:24-9:24, Aug. 10, 2006, *available at* www.fd.org/HartleyTranscript8.10.06 (The Court: "[T]he Fourth Circuit Court of Appeals ... has established a pretty rigid view that the guidelines are not only presumptively reasonable, but the requirement is that in order to sentence outside the guidelines, you have to show that the guideline sentence is in some fashion unreasonable it almost seems.").

II. INATTENTIVENESS TO THE TEXT OF SECTION 3553(a) HAS SKEWED REASONABLENESS REVIEW

This Court has instructed the courts of appeals to review district courts' compliance with Congress's parsimony statute for unreasonableness, "guid[ed]" by "Section 3553(a)['s] ... numerous factors." *Booker*, 543 U.S. at 261, 264.

A. Section 3553(a) Requires District Courts To Consider Seven Factors And To Impose A Sentence Sufficient But Not Greater Than Necessary To Comply With Congress's Statement Of The Purposes Of Sentencing

"[I]n any case of statutory construction, [this Court's] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted). The language of Section 3553(a) is plain: it instructs district courts to "consider" a number of factors, but has only one mandate—the "court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." 18 U.S.C. § 3553(a) (emphasis added).[9]

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[9] Previously, the parsimony provision had to be applied in conjunction with the statute's primary mandate—§ 3553(b)'s requirement that the court *shall* impose a guidelines sentence unless there was a basis for a guidelines departure. In *Booker*, however, this Court excised § 3553(b), after concluding that "[t]he remainder of the Act 'functions independently,'" 543 U.S. at 259 (citation omitted), leaving the parsimony

The words of Section 3553(a) should be given their "ordinary meaning." *Jones v. United States*, 529 U.S. 848, 855 (2000) (citation omitted). Here, the parsimony provision uses "the mandatory [term] 'shall,' which normally creates an obligation impervious to judicial discretion." *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Bd. of Pardons v. Allen*, 482 U.S. 369, 374 (1987) (The "use of the word shall" signifies "mandatory language."); *United States v. Vonner*, 452 F.3d 560, 565 (6th Cir. 2006) ("Complying with Section 3553(a) is not optional."), *vacated by* 2006 U.S. App. LEXIS 27661 (6th Cir. 2006). This Court's opinion in *Booker* itself recognizes that "shall" binds district judges. 543 U.S. at 249 (explaining that Section 3553(b), providing that courts "shall" follow the guidelines, renders them "mandatory").

In serving the statute's parsimony mandate, a district court "shall consider" seven specific sentencing factors in determining the parsimonious sentence that the court *shall impose*. 18 U.S.C. § 3553(a) (emphasis added).[10] "Consider," of course, is commonly understood to mean, "to think about," Webster's New World Dictionary 303 (2d College Ed. 1984), and it requires contemplation, but does

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provision as the only direct statutory mandate that the district court must follow. The purposes that Congress set forth in paragraph (2) are "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(A)-(D).

[10] The factors (apart from the guidelines, *see* 18 U.S.C. § 3553(a)(4)) that a district court shall "consider" are: "the nature and circumstances of the offense and the history and characteristics of the defendant," the sentencing policies set forth by Congress, "the kinds of sentences available," pertinent policy statements from the Commission, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and "the need to provide restitution to any victims of the offense." *Id.* §§ 3553(a)(1)-(3), (5)-(7).

not go so far as to require action based on that contemplation. The statute thus instructs district courts to impose a "sentence sufficient, but not greater than necessary to comply with the purposes of paragraph (2)" and in the process of reaching that determination, the court must think carefully about six additional factors, only one of which is the advisory-guidelines range. "[S]ubsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence." *Booker*, 543 U.S. at 234. There is no hierarchy among the factors a district court must "consider" and nothing in the statutory language supports an interpretation that Section 3553(a)(4)(A) is entitled to more weight than other factors. As Justice Scalia observed, "[t]he statute provides no order of priority among all those factors." *Id.* at 304-05 (dissenting in part). "Where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted).

B. A Presumption Of Reasonableness For Within-Guidelines Sentences Is Incompatible With The Text Of Section 3553(a)

At least seven circuits have adopted an explicit presumption of reasonableness and endorsed an approach to sentencing that is less parsimonious and less individualized than the statute unambiguously requires. This is true of at least the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits,[11] where a "defendant can rebut this presumption only by demonstrating that his or her [guidelines] sentence is unreasonable *when measured*

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[11] *See United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006).

against the factors set forth in § 3553(a)." *Mykytiuk*, 415 F.3d at 608 (emphasis added).

Because the guidelines had primacy and were legally binding before *Booker*, it is perhaps not surprising that circuit courts have elevated the guidelines above the other factors enumerated in Section 3553(a) when conducting reasonableness review. But an affinity for within-guidelines sentences—whether through a formal presumption of reasonableness or a pattern of affirmances—is inconsistent with Section 3553(a) in two respects.

First, it endows the guidelines with a special, most-favored status among Section 3553(a)'s factors that is nowhere in the words of the statute enacted by Congress (and left unchanged in two years since *Booker*) or this Court's opinion in *Booker*. Such a construction would effectively read out of the statute and functionally nullify Sections 3553(a)(1)-(3) and Sections 3553(5)-(7). Courts, however, "are obliged to give effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), and where "[t]he statute admits a reasonable construction which gives effect to all of its provisions ... [this Court] will not adopt a strained reading which renders one part a mere redundancy," *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 308 (1961).

This Court has invalidated other judicially created presumptions based on the satisfaction of one factor where Congress has enumerated a list of factors to be "considered." In *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994), the Court held that a presumption against fair use based solely on the commercial nature of a parody was incompatible with section 107 of the Copyright Act, which lists four factors for courts to "consider[]" in determining whether an artistic work is fair use. *Id.* at 577. This Court explained: "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis ... . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed

together, in light of the purposes of copyright." *Id.* at 577-78 (citations omitted).

The courts adopting a presumption of reasonableness for within-guidelines sentences have effectively done what *Campbell* prohibits—they have interpreted Section 3553(a)'s directive to "consider" the guidelines to mean "follow unless," by some undefined quantum of evidence, the defendant can prove that a guidelines sentence is inappropriate. The presumption "indicate[s] that the Guideline range *is* to be used unless (by some evidentiary standard) a party can prove to the contrary. That is much more than a mere consult for advice, and the Guidelines are to be no more than that." *United States v. Zavala*, 443 F.3d 1165, 1169 (9th Cir.) (emphasis in original), *vacated by* 462 F.3d 1066 (9th Cir. 2006); *accord United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006). Because of heavy criminal caseloads, it is perhaps understandable why circuits might look for convenient "bright-line rules" like a presumption of reasonableness to simplify their appellate task. But, as in *Campbell*, this Court should make clear that, when the statutory text demands a refined case-by-case analysis, courts of appeals may not create extra-textual doctrines in an effort to evade congressionally-imposed responsibilities.

Second, the "guidelines unless" approach promotes an unthinking and reflexive adherence to the guidelines, especially in close cases where, absent the presumption, a below-guidelines sentence would be "sufficient, but not greater than necessary" to meet the purposes of sentencing.[12] The presumption, therefore, cannot be

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[12] Though the courts of appeals half-heartedly reject the suggestion that the presumption says anything about sentences outside of the range, *Green*, 436 F.3d at 457 ("A sentence falling outside of the properly calculated Guidelines range is not *ipso facto* unreasonable."), at the very least, the presumption "cast[s] a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment." *United States v. Buchanan*, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring).

reconciled with the parsimony provision established by Congress as the primary directive in Section 3553(a).[13]

Confronted by text intolerant of that presumption, most courts have simply chosen to ignore the parsimony provision. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 525 n.8 (1st Cir. 2006) (en banc) (Lipez, J., dissenting) (noting that the parsimony provision has received "scant attention"). Only a handful of the more than 1,500 decisions examined in NYCDL's study even mention the parsimony provision. *Cf.* Douglas A. Berman, *Crack sentencing and the anti-parsimony pandemic*, Sentencing Law & Policy Weblog, available at http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/crack_sentencin.html (noting that circuit courts reversing below-guidelines crack sentences have consistently avoided any mention of the parsimony provision).

Some courts applying the presumption of reasonableness have all but acknowledged that the presumption is inconsistent with parsimony. In *United States v. Wurzinger*, 467 F.3d 649, 653 (7th Cir. 2006), for example, the Seventh Circuit held that "[w]hile we say nothing about whether a lower sentence would have been equally reasonable, age and illness do not, in the face of the circumstances presented here, make Wurzinger's sentence unreasonable." But, if the parsimony provision has any meaning, then in the face of two equally sufficient sentences, the court *must* impose the lower sentence. *See, e.g., United States v. Carey*, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wis. 2005) (Adelman, J.) ("When two sufficient and reasonable sentences are potentially applicable, the statute directs the

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[13] *See, e.g.*, Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 83 (2005) (concluding that "the structure of section 3553(a), which begins with the parsimony provision "sets overall limits on the crime-control and other purposes which follow"); David L. McColgin & Brett G. Sweitzer, *Grid & Bear It*, 29 Champion 50, 50 (2005) (stating that the parsimony provision "is not just another 'factor' to be considered along with others set forth in Section 3553(a) ... —it sets an independent limit on the sentence a court may impose").

court to choose the lesser one."); *United States v. Yopp*, 453 F.3d 770, 774 (6th Cir. 2006) (finding that a higher sentence imposed by the district court violated the parsimony provision where the district court also articulated a lower sentence that would satisfy the purposes of sentencing).

Some courts have even concluded that other statutory factors to be "consider[ed]" can outweigh the mandate of the parsimony provision. *See, e.g., United States v. Davis*, 458 F.3d 491, 495-96, 500 (6th Cir. 2006) (vacating below-guidelines sentence and concluding that adherence to the guidelines in order to avoid sentencing disparities outweighed parsimony provision's directive). More courts have suggested that the guidelines sentences themselves embody "sufficient" punishment—a conclusion supported by the courts of appeals' penchant for affirming all within-guidelines sentences and finding below-guidelines sentences unreasonable. *See, e.g., United States v. Charles*, 467 F.3d 828, 833 (3d Cir. 2006) (rejecting defendant's challenge to a high-end guidelines range sentence based on the parsimony provision). That a sentence is "sufficient," however, says nothing about whether it is "greater than necessary."

III. THE SENTENCING COMMISSION'S OWN ANALYSIS HIGHLIGHTS THE FLAWS OF A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Several courts have presumed that within-guidelines sentences are reasonable because they believe that the guidelines take into account all of the other Section 3553(a) factors and that they further all of the goals of sentencing. Both beliefs are misguided. The guidelines were not promulgated to comply with the parsimony provision, and the Commission itself has found that the guidelines sentencing system "has fallen short ... in several respects." USSC Assessment Report at 144.

A. The Guidelines Do Not Take Into Account All Of The Sentencing Factors That Congress Requires District Courts To Consider

Many courts have justified the presumption of reasonableness on the theory that the guidelines already take into account all of the other Section 3553(a) factors. That is wrong as a textual matter. The statutory instructions that Congress gave to the Commission do not task it with deciphering Section 3553(a)'s command that sentencing courts "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. Additionally, when developing and revising the guidelines, the Commission has never fully explored—nor even formally addressed—whether the guidelines serve this mandate.

Further, the process by which the guidelines were created, and the Commission's own statements regarding their deficiencies, undermine any claim that the guidelines render the Section 3553(a) factors extraneous. Congress directed the Commission to promulgate guidelines to further the purposes of sentencing enumerated in Section 3553(a)(2)—just punishment, deterrence, protection of the public, and effective education and treatment for offenders. The Commission, however, was comprised of members with wide-ranging beliefs on criminal justice. Consequently, the guidelines represent "compromises and contradictions in both the goals to be achieved by sentencing reform and in the mechanisms created to achieve them." USSC Assessment Report at 3. Importantly, the original Guidelines Manual suggests that the Commission considered only "just deserts" and "crime control," rather than all of the statutory purposes, when promulgating the guidelines. *See* U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

In addition, the Commission itself has recognized that it could not "anticipate and describe in general guidelines every possible circumstance relevant to sentencing in every case." USSC Assessment Report at 32. The "difficulty of foreseeing and capturing a single set of Guidelines that

encompasses the vast range of human conduct potentially relevant to a sentencing decision" prompted the Commission to permit departures from the guidelines, even under a mandatory guidelines scheme. United States Sentencing Commission, Downward Departures from the Federal Sentencing Guidelines 3 (2003) (quoting U.S.S.G., Ch. 1, Pt. A (4)(B) (Apr. 13, 1987)). The belief that the guidelines account for all relevant sentencing factors is also inconsistent with this Court's decision in *Koon*. There, this Court observed that "the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear on the decision to depart." 518 U.S. at 94.

At the same time, however, the Commission has added additional, only marginally relevant, factors to be evaluated in calculating a defendant's offense level. This has led to what the Commission has called "factor creep" in which "[a]djustments that appear necessary to achieve proportional punishment may in actuality result in arbitrary distinctions among offenders." USSC Assessment Report at 137. According to the Commission, "[c]omplex rules with many adjustments may foster a perception of a precise moral calculus but on closer inspection this precision proves false." *Id.* And, "as more and more adjustments are added to the sentence rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness." *Id.* "Factor creep" has also been largely upward, while the Commission has rejected consideration of significant mitigating factors that bear upon personal culpability. *See, e.g., United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) ("The Commission has simply ignored many of the provisions of the statute that weigh in favor of leniency ... .").

The Commission's own series of reports on recidivism also show that many factors affecting deterrence (a statutory goal) are not captured by the guidelines. These reports indicate that factors such as age, marital status,

employment history, and educational advancement affect recidivism rates. *See* U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, a Component of the 15 Year Report 29 (2004). Yet the guidelines' policy statements proclaim that these factors "are not ordinarily relevant" to a district court's sentencing decision. U.S.S.G. §§ 5H1.1 (age), 5H1.2 (education), 5H1.5 (employment record) 5H1.6 (family ties) (2006).

More specifically, Section 3553(a)(1) requires a district court to "consider the nature and circumstances of the offense and the history and characteristics of the defendant." *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). The guidelines, of course, are generalizations and cannot possibly take into account the history and characteristics of any particular defendant. And, the guidelines specifically *prohibit* consideration of many of a defendant's personal characteristics, including lack of guidance as a youth, U.S.S.G. § 5H1.12, drug or alcohol dependence, *id.* § 5H1.4, and post-sentencing rehabilitation, *id.* § 5K2.19. Other discouraged factors include mental or emotional conditions, *id.* § 5H1.3, physical condition, *id.* § 5H1.14, family responsibilities, *id.* § 5H1.6, and public service or military contributions, *id.* § 5H1.11. But, as Judge Merritt has pointed out: "that the Commission has abdicated its duty to consider the 'purposes' of sentencing and the personal characteristics of defendants does not authorize a court to abdicate its duty to impose a sentence 'not greater than necessary' under § 3553(a)." *Davern*, 970 F.2d at 1503 (dissent). Rather, as this Court held in *Booker*, sentencing courts must "consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" 543 U.S. at 249 (quoting § 3553(a)(1)).

B. The Sentencing Commission Has Found That The Guidelines Can Result In Sentences That Do Not Effectively Serve The Goals Of Section 3553(a)

The courts of appeals have ignored the Commission's own findings that in some respects the guidelines are flawed and have not "worked as intended." USSC Assessment Report at xvi.

The Commission Has Reported Disparity At The Pre-Sentencing Stages

The Commission has reported that "a variety of evidence developed through the guidelines era suggests that the mechanisms and procedures designed to control disparity arising at presentencing stages are not all working as intended," USSC Assessment Report at xii, 82, and that "significant evidence suggests that presentencing stages introduce disparity in sentencing," *id.* at xvi. Charging decisions and the non-uniform standards for the preparation of pre-sentencing reports foster and perpetuate disparities between similarly situated offenders. *Id.* at 82-86. Statutory enhancements are unevenly charged by prosecutors in different districts across the country. *Id.* at 90. Regional disparities, which "may have even increased among drug trafficking offenses" under the guidelines, *id.* at 94, are also caused by prosecutors' decisions with respect to substantial assistance motions, *id.*, and by "irregular and inconsistent policies and practices among the various districts," *id.* at 104.[14] In addition, many pre-sentencing decisions "disproportionately disadvantage minority offenders." *Id.* at 91. Not only have the guidelines mechanisms designed to address these disparities failed to work as intended, they work badly "*in one direction*," *id.* at 92 (emphasis added), by authorizing enhanced sentences

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[14] Commentators have found that regional disparity has "more than tripled after implementation of the Guidelines." Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 101 (2005).

even for uncharged or dismissed conduct, but by providing no comparable mechanism to reduce sentences for conduct that was inflated by charging decisions, *id.*

A chief goal of the remedy this Court adopted in *Booker* was to minimize the impact of prosecutorial charging and bargaining choice at sentencing. 543 U.S. 257 (rejecting the dissenters' remedy in part because it would vest prosecutors with discretionary power that properly resides with judges). Moreover, as Justices of this Court and lower court judges have recognized, "[m]ost of the sentencing discretion should be with the judge, not the prosecutors" and "a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided." Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; *see also Davern*, 970 F.2d at 1508 (Merritt, C.J., dissenting) (stating that under the mandatory guidelines, "[t]he prosecutors ... effectively control both the charging and the sentencing system[] [a]nd to an ever-increasing extent, the two are one and the same"). Unfortunately, the Commission's assessments have revealed that, under rigid enforcement of the guidelines, "discretionary decisions by law enforcement officers and prosecutors at presentencing stages have greater influence ..., since later actors [that is, judges] have fewer opportunities to ameliorate any effect of disparate treatment prior to sentencing." USSC Assessment Report at 99. After *Booker*, however, the guidelines are only one of seven factors for the judge to consider in fashioning a sentence, and judges now have greater opportunity to remedy disparate presentencing treatment through reasoned decisions to move away from the guidelines' recommendations in appropriate cases.

Problems With The Drug Guidelines

Drug offenses make up the largest portion of the federal criminal docket, but "the guidelines' Drug Quantity Tables[] fail in some cases to reflect the relative harmfulness of

different drugs." USSC Assessment Report at vii. The guidelines' quantity-based approach and relevant conduct rules have "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." *Id.* at 49. These tables, as a result, greatly elevate the importance of *quantity* over other offense characteristics. *Id.* at 50. As the Commission has found, quantity can be "a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making." *Id.* at 52. The Commission's findings point out that rigid adherence to all of the drug trafficking guidelines can and will result in sentences that are *greater than necessary* to comply with the purposes of sentencing set forth by Congress.[15]

Problems With The Career Offender Guideline

The Commission has also found that the career offender guideline has a disproportionate impact on low-level and minority drug offenders without serving any justifiable purpose. The Commission's evidence shows that "recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions ... are much lower than [for] other offenders who are assigned to criminal history category VI." USSC Assessment Report at 134. In fact, these offenders' recidivism rates are more similar to those of offenders in lower criminal history categories "in which they would be placed under normal criminal history scoring rules" absent the career offender guideline. *Id.* at 134. The Commission has concluded that "[t]he career offender guideline ... makes the criminal history category a *less* perfect measure of

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[15] Although some of these problems result from the statutory mandatory minimum, the guidelines themselves often dictate the actual sentence, significantly increasing average sentence length by "[a]bout 25 percent, or eighteen months" *above* the mandatory minimums. *Id.* at 54 (Commission statistic for offenders sentenced in 2001).

recidivism than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id.* (emphasis in original).

Other Sources Of Unwarranted Guidelines Disparity

The guidelines have also *increased* sentencing disparities based on race, USSC Assessment Report at 115, and "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation." *Id.* at 137.[16] The Commission also reports that "unexplained differences in the sentencing of women compared to men are greater than any unexplained differences in the sentencing of different racial and ethnic groups." *Id.* at 118. The Commission's empirical work indicates that a nine-month gender disparity in the average sentence imposed before the guidelines has been replaced by a 23-month gender disparity in the average sentence imposed during the guidelines regime. *Id.* at 127-28 & fig. 4.9.

All of these findings have led the Commission to conclude that "some of the gap may result from sentencing rules that have a disproportionate impact on a particular offender group *but that serve no clear sentencing purpose.*" *Id.* at 131 (emphasis added). The courts of appeals' assumption that "disparities are at their ebb when the Guidelines are followed," *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006), is thus contradicted by the Commission's own empirical evidence and statements.

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In sum, the Sentencing Commission, after comprehensive study and in-depth analysis of actual sentencing data, has concluded that "[a]ttention might fruitfully be turned to asking whether [certain guideline] policies are necessary to achieve *any legitimate purpose of*

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[16] *See also* Alschuler, *Disparity*, at 103; Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161 (1991).

sentencing," USSC Assessment Report at 135, and "the reformed sentencing system has fallen short of th[e] ideal in several respects," *id.* at 143-44, by failing to fully achieve "the goals of sentence reform," *id.* at 144. The Commission's compelling evidence shows that many of the effects of the guidelines are neither deliberate nor in furtherance of any legitimate sentencing purpose, and that these flaws have led to sentences that are greater than necessary to achieve the goals of sentencing, thus contravening the parsimony provision. As a result, sentences under the guidelines as well as rates of imprisonment have increased dramatically from pre-guidelines levels. *Id.* at vi.[17] These facts undermine the basis for the courts of appeals' ill-conceived presumption and slavish adherence to the suggested sentencing ranges.

IV. A DISTRICT COURT MUST STATE ON THE RECORD ITS REASONS FOR THE SENTENCE IMPOSED

Although a detailed discussion of the third question presented is beyond the scope of this brief, NYCDL does believe that in order for the post-*Booker* sentencing system to operate in a fair, just, and individualized manner, and to allow for meaningful appellate reasonableness review, district courts must state, on the record, the reasons for the sentence imposed. Prior to the guidelines, "[j]udges were not required to explain the reasons for their sentences, and the sentences themselves were largely immune from appeal." USSC Assessment Report at xviii. The Sentencing Reform Act and the guidelines were designed to inject transparency into the sentencing system. As the Commission has noted, "appellate courts cannot perform their assigned functions without the cooperation of other participants in the system. Appellate review depends on

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[17] "Between November 1987 and 1992, the average prison terms served by federal felons more than doubled." USSC Assessment Report at vi; *see also id.* ("[F]ederal offenders sentenced in 2002 will spend almost twice as long in prison as did offenders sentenced in 1984.").

clear fact findings and statements of reasons by the sentencing courts to provide a sufficient record for review." *Id.* at 35; *see also* 18 U.S.C. § 3553(c); *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (Posner, J.) ("[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise. A rote statement that the judge considered all relevant factors will not always suffice."). The absence of a requirement that district courts explain the reasons for the sentence imposed (like the presumption) increases the incentives for a "busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors." *Cunningham*, 429 F.3d at 679. This risk "cannot be ignored." *Id.*

CONCLUSION

A proper interpretation of Section 3553(a) and an appreciation of the limitations of the guidelines is necessary for courts to exercise reasoned judgment when "impos[ing] sentences sufficient, but not greater than necessary to comply with the purposes of paragraph (2)." "Although the guidelines were legally complex ... the bottom-line judgments were largely mechanical once the offense level and the criminal history numbers were calculated. ... But now the bottom-line judgments are not mechanical. They must now be more nuanced judgments that reflect both the guidelines analysis and the larger context of the sentencing factors and purposes identified in section 3553." *Jimenez-Beltre*, 440 F.3d at 528 (Lipez, J., dissenting). The nuanced approach mandated by Section 3553(a) "requires courts of appeals to evaluate each sentence *individually* for reasonableness." *Booker*, 543 U.S. at 312 (Scalia, J., dissenting in part). Indeed, as this Court acknowledged in its remedial opinion, because of the *individualized* review required for each *defendant*, reasonableness review perhaps may not provide the same degree of national uniformity for

groups of offenders that Congress originally sought to secure. *Id.* at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). If courts comply with the text of Section 3553(a), however, sentencing outcomes will be more reasoned and more consistent than those produced by rigid, unthinking adherence to the guidelines.

There is neither room in the text nor any basis for a presumption that within-guidelines sentences are reasonable applications of Section 3553(a) in light of the Commission's findings. The picture of appellate review that has emerged since *Booker*, as reflected in the NYCDL data, suggests that the courts of appeals are operating in a strongly non-parsimonious fashion. This sends a powerfully discouraging—if not flatly prohibitive—message about the exercise of discretion to district courts. This message has precisely the opposite effect that *Booker* contemplated.

Guidelines sentences should not be presumed reasonable. Instead, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. Section 3553(a) requires nothing less.

Respectfully submitted,

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APPENDIX

SUMMARY OF FINDINGS

Nearly two years ago, this Court held in *United States v. Booker*, 543 U.S. 220 (2005), that requiring judges to impose sentences pursuant to the then-mandatory sentencing guidelines was unconstitutional. To solve this problem, the Court excised the provision making the guidelines mandatory, 18 U.S.C. § 3553(b); deemed the guidelines "effectively advisory"; directed district judges to make sentencing decisions based upon all the factors in Section 3553(a); and instructed the courts of appeals to review sentences for "unreasonableness."

When *Booker* was decided, "no one kn[ew] ... how advisory Guidelines and 'unreasonableness' review w[ould] function in practice." 543 U.S. at 311 (Scalia, J., dissenting in part). Now, however, a body of data revealing how courts of appeals have applied *Booker*'s standard has emerged. *Amicus curiae* New York Council of Defense Lawyers has analyzed this information, conducting a survey of cases from January 1, 2006 through November 16, 2006, in which the courts of appeals engaged in reasonableness review.[1]

The survey was conducted using Westlaw. Two date-restricted searches were used. The first, broader search, was designed to capture all cases that cited this Court's decision in *Booker*. The terms used were: Booker & Reasonab! Unreasonab!. This search returned approximately 2,800 cases. The second search was crafted to capture those cases (mostly unpublished dispositions) in which the courts of appeals applied unreasonableness review, but did not cite *Booker*. The terms used were: Sentenc! /3 Guideline / 20 Reasonab! Unreasonab! (#Not /3 Reasonab!) & Da (Aft 12/31/2005) % Booker. This search yielded approximately 250 cases.

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[1] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve review for reasonableness, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*.

Counsel for the NYCDL reviewed the cases and entered relevant information into a database. The categories of information compiled included: (1) case name and citation; (2) type of crime;[2](3) advisory guideline range; (4) sentence;[3] (5) whether the sentence was within, above, or below the advisory range; (6) whether it was the government or the defendant that appealed; (7) whether the sentence was affirmed or reversed; (8) whether the government or the defendant prevailed in the appeal; and (9) if the sentence was vacated, whether the basis was procedural or substantive.

Counsel excluded from the database all cases that included the search terms but did not actually engage in reasonableness review. For example, cases involving appellate review of pre-*Booker* sentences for plain error remands were not included. Likewise, cases in which the court of appeals remanded solely because the advisory guideline range was not calculated properly were excluded. At the conclusion of the review, NYCDL's database included 1,515 cases. The database is included in this appendix for the Court's review.

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The results of NYCDL's analysis of the 1,515 cases in the database are briefly summarized below.

- 154 cases involved sentences above the guidelines that were appealed by the defendants;
- Nearly all of these above-guidelines sentences were affirmed; only 7 were vacated;
- 60 of 71 below-guidelines sentences appealed by the Government were vacated as unreasonable;
- There were also 138 below-guidelines sentences appealed by defendants, and zero were found to be

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[2] Crimes were grouped as follows: D = Drugs; I = Immigration; T = Theft/Fraud offenses; F = Firearms; S = Sex crimes; and O = Other.

[3] The sentence refers to the number of months of imprisonment reflected in the court of appeals' opinion exclusive of any terms of supervised release, home confinement, fines, or other sentencing terms.

unreasonable;

- Of the remaining 1,152 within-guidelines sentences appealed by defendants, 16 sentences were vacated;
- 15 of the reversals were for procedural reasons, almost uniformly that the district court failed to articulate its reasons for the sentence; and
- Only 1 within-guidelines sentence was found to be substantively unreasonable.

NYCDL then broke down these findings by circuit, according to whether the circuit has explicitly held that a sentence imposed within a properly calculated advisory-guidelines range is presumed to be reasonable. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have explicitly adopted this presumption of reasonableness. In these circuits:

- 93 were appeals by the defendant of an above-guidelines sentence;
- 88 of these sentences were affirmed; only 5 were vacated;
- There were 51 below-guidelines sentences that were appealed by the Government;
- Nearly all of these sentences (47) were vacated; and
- Of the remaining 693 within-guidelines sentences appealed by the defendants, only 7 were vacated.

In circuits that have not explicitly adopted a presumption of reasonableness—the First, Second, Third, Ninth, and Eleventh Circuits—the findings are as follows:

- 61 above-guidelines sentences were appealed by the defendants;
- Virtually all of these sentences were affirmed; only 2 were vacated;
- 20 below-guidelines sentences were appealed by the government and 13 were vacated; and
- Of the remaining 459 within-guidelines sentences appealed by the defendants, 9 were vacated.

Mr. Rita's case was appealed from the Fourth Circuit. In that circuit, there were:

- 201 within-guidelines sentences appealed by the defendants;
- All 201 of these sentences were found to be reasonable;
- There were 10 appeals by defendants of above-guidelines sentences;
- Only 1 sentence was vacated;
- The government appealed 9 below-guidelines sentences; and
- All 9 of these below-guidelines sentences were found to be unreasonable.

Mr. Claiborne's case was appealed from the Eighth Circuit. The data from that circuit show the following:

- There were 118 within-guidelines sentences appealed by the defendants;
- Only 2 of these sentences were vacated;
- 1 reversal was based on an inadequate explanation by the district court, and the other remains the only case in which a circuit court has found a within-guidelines sentences to be substantively unreasonable;
- There were 22 appeals by defendants of above-guidelines sentences;
- Nearly all of these sentences were affirmed; only 1 was vacated;
- The government appealed 28 below-guidelines sentences;
- Nearly all of these sentences were reversed; 27 of these below-guidelines sentences were found to be unreasonable; and
- In *United States v. Burns*, 438 F.3d 826 (8th Cir. 2006), a panel of the Eighth Circuit, affirmed a below-guidelines sentence, notwithstanding the government's appeal. The full Eighth Circuit has since vacated the panel decision and reheard the case *en banc*. *See* 2006 U.S. App. LEXIS 12239 (8th Cir. May 18, 2006).

RESULTS FOR CIRCUITS THAT HAVE EXPLICITLY ADOPTED A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Cir.	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
4	1/10	0/201	9/9
5	1/28	0/86	5/5
6	2/17	1/91	1/2
7	0/8	1/86	4/6
8	1/22	2/118	27/28
10	0/8	3/108	1/1
DC	0/0	0/3	0/0
Total	5/93	7/693	47/51

RESULTS FOR CIRCUITS THAT HAVE NOT EXPLICITLY ADOPTED A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Cir.	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
1	1/3	0/30	4/4
2	0/6	1/60	2/3
3	0/10	1/71	1/1
9	1/19	6/107	1/3
11	0/23	1/191	5/9
Total	2/61	9/459	13/20

FIRST CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Abad-Reyes, 187 Fed. Appx. 6 (1st Cir. 2006)	I	1-7	24	A	D	A	G	
U.S. v. Scherrer, 444 F.3d 91 (1st Cir. 2006)	T	?-63	96	A	D	A	G	
U.S. v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006)	O	0-6	48	A	D	R	D	S
U.S. v. Meran, 463 F.3d 47 (1st Cir. 2006)	D	108-135	75	B	D	A	G	
U.S. v. Griffin, 187 Fed. Appx. 13 (1st Cir. 2006)	D	210-262	198	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McGuire, 185 Fed. Appx. 15 (1st Cir. 2006)	D	360-life	300	B	D	A	G	
U.S. v. Caraballo, 447 F.3d 26 (1st Cir. 2006)	D	151-188	108	B	D	A	G	
U.S. v. Thurston, 456 F.3d 211 (1st Cir. 2006)	T	63-78 (60 stat max)	3	B	G	R	G	S
U.S. v. Smith, 445 F.3d 1 (1st Cir. 2006)	D	100-125	46	B	G	R	G	S
U.S. v. Pho, 433 F.3d 53 (1st Cir. 2006)	D	87-108	64	B	G	R	G	S
U.S. v. Lewis, 433 F.3d 53 (1st Cir. 2006)	D	235-293	188	B	G	R	G	S
U.S. v. Fanfan, 2006 WL 3217712 (1st Cir. 2006)	D		210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hernandez, 2006 WL 3041972 (1st Cir. 2006)	F	180 (minim um)	188	W	D	A	G	
U.S. v. Jahagirdar, 2006 WL 2988661 (1st Cir. 2006)	O		87	W	D	A	G	
U.S. v. Anziani, 2006 WL 2924936 (1st Cir. 2006)	D		121	W	D	A	G	
U.S. v. Santos-Martinez, 2006 WL 2709460 (1st Cir. 2006)	I		16	W	D	A	G	
U.S. v. Jones, 2006 WL 2673296 (1st Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Rodriguez,2006 WL2673310(1st Cir. 2006)	D		188	W	D	A	G	
U.S. v. Segalla, 2006 WL 2555913 (1st Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Quirindongo-Martinez, 2006 WL 2439968 (1st Cir. 2006)	O	27-33	33	W	D	A	G	
U.S. v. Peralta, 457 F.3d 169 (1st Cir. 2006)	D		135	W	D	A	G	
U.S. v. Burks, 2006 WL 2130106 (1st Cir. 2006)	D	120-?	120	W	D	A	G	
U.S. v. Morales-Rodriguez, 2006 WL 2034694 (1st Cir. 2006)	T		121	W	D	A	G	
U.S. v. Trinidad-Rodriguez, 2006 WL 3233767 (1st Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Vazquez-Mieses, 2006 WL 2742550 (1st Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Washington, 187 Fed. Appx. 3 (1st Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. Feliz, 453 F.3d 33 (1st Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Wilson, 185 Fed. Appx. 6 (1st Cir. 2006)	D		320	W	D	A	G	
U.S. v. Brown, 450 F.3d 76 (1st Cir. 2006)	D	70-?	70	W	D	A	G	
U.S. v. Alvarez-Enciso, 181 Fed. Appx. 8 (1st Cir. 2006)	I	24-30	24	W	D	A	G	
U.S. v. Navedo-Concepcion, 450 F.3d 54 (1st Cir. 2006)	D	121-151	151	W	D	A	G	
U.S. v. Soto-Cruz, 449 F.3d 258 (1st Cir. 2006)	T	121-151	144	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castro-Polanco, 182 Fed. Appx. 1 (1st Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Dixon, 449 F.3d 194 (1st Cir. 2006)	O	92-115	115	W	D	A	G	
U.S. v. Rivera, 448 F.3d 82 (1st Cir. 2006)	D, F	188-235	188	W	D	A	G	
U.S. v. Sagendorf, 445 F.3d 515 (1st Cir. 2006)	O	41-?	41	W	D	A	G	
U.S. v. Alli, 444 F.3d 34 (1st Cir. 2006)	T	18-24	21	W	D	A	G	
U.S. v. Saez, 444 F.3d 15 (1st Cir. 2006)	D	130-?	130	W	D	A	G	
U.S. v. Jiminez-Beltre, 440 F.3d 514 (1st Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Montero-Diaz, 173 Fed. Appx. 7 (1st Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Turbides-Leonardo, --F.3d--, 2006 WL 3290937 (1st Cir. 2006)	D		48	W	D	A	G	

SECOND CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pereira, 2006 WL 2925642 (2d Cir. 2006)	I	41-51	62	A	D	A	G	
U.S. v. Nurse, 2006 WL 2382919 (2d Cir. 2006)	T	7-13	24	A	D	A	G	
U.S. v. Singletary, 458 F.3d 72 (2d Cir. 2006)	D	27-33	42	A	D	A	G	
U.S. v. Fairclough, 439 F.3d 76 (2d Cir. 2006)	F	21-27	48	A	D	A	G	
U.S. v. Pettus, 2006 WL 328267 (2d Cir. 2006)	O	4-10	18	A	D	A	G	
U.S. v. Orlandez-Gamboa, 2006 WL 1668055 (2d Cir. 2006)	D	325-405	480	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santiago, 2006 WL 3147353 (2d Cir. 2006)	S	70-87	63	B	D	A	G	
U.S. v. Giovanelli, 464 F.3d 346 (2d Cir. 2006)	O	121-151	90	B	D	A	G	
U.S. v. Mejia, 461 F.3d 158 (2d Cir. 2006)	I	46-57	37	B	D	A	G	
U.S. v. Ebbers, 458 F.3d 110 (2d Cir. 2006)	F	30 years to life	25 years	B	D	A	G	
U.S. v. Kane, 452 F.3d 140 (2d Cir. 2006)	T	30-37	24	B	D	A	G	
U.S. v. Florez, 447 F.3d 145 (2d Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. McFarlane, 2006 WL 2521649 (2d Cir. 2006)	D		41	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Earls, 2006 WL 3310314 (2d Cir. 2006)	F		125	B	D	A	G	
U.S. v. Jones, 460 F.3d 191 (2d Cir. 2006)	D	30-37	15	B	G	A	D	
U.S. v. Castillo, 460 F.3d 337 (2d Cir. 2006)	D	135-168	87	B	G	R	G	S
U.S. v. Rattoballi, 452 F.3d 127 (2d Cir. 2006)	T	27-33	12	B	G	R	G	S
U.S. v. Maflahi, 2006 WL 2672085 (2d Cir. 2006)	O	210-262	60	Stat max	D	A	G	
U.S. v. Riley, 452 F.3d 160 (2d Cir. 2006)	F	188-235	120	Stat max	D	A	G	
U.S. v. Stinson, 2006 WL 2711988 (2d Cir. 2006)	F		51	W	D	A	G	
U.S. v. Morgan, 2006 WL 3026148 (2d Cir. 2006)	I		74	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 2006 WL 2711988 (2d Cir. 2006)	D	70-87	72	W	D	A	G	
U.S. v. Santos, 2006 WL 2564390 (2d Cir. 2006)	D		70	W	D	A	G	
U.S. v. Velasquez, 2006 WL 2990234 (2d Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Park, 461 F.3d 245 (2d Cir. 2006)	D		151	W	D	A	G	
U.S. v. Bliss, 2006 WL 1975433 (2d Cir. 2006)	D		40 years	W	D	A	G	
U.S. v. Ramirez, 454 F.3d 380 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Ortega, 2006 WL 1843520 (2d Cir. 2006)	F		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Casteneda, 2006 WL 1737827 (2d Cir. 2006)	D			W	D	A	G	
U.S. v. Bello-Mosqueda, 2006 WL 1766703 (2d Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Delarosa, 2006 WL 1763878 (2d Cir.2006)	T		45	W	D	A	G	
U.S. v. Jimenez, 451 F.3d 97 (2d Cir. 2006)	D	57-71	60	W	D	A	G	
U.S. v. Macias, 2006 WL 1594003 (2d Cir. 2006)	D		108	W	D	A	G	
U.S. v. Elliot, 2006 WL 1582689 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Forquet, 2006 WL 1582690 (2d Cir. 2006)	D		151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wu, 2006 WL 1423474 (2d Cir. 2006)	O		6	W	D	A	G	
U.S. v. Villanova, 2006 WL 1423432 (2d Cir. 2006)	I		77	W	D	A	G	
U.S. v. Tavera, 2006 WL 1426824 (2d Cir. 2006)	D		57	W	D	A	G	
U.S. v. Martinez, 2006 WL 1359946 (2d Cir. 2006)	D		135	W	D	A	G	
U.S. v. Caballero-Espinal, 2006 WL 1070941 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Matrulli, 2006 WL 1049108 (2d Cir. 2006)	T	33-41	33	W	D	A	G	
U.S. v. McDaniel, 2006 WL 917208 (2d Cir. 2006)	F		72	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nicholas, 2006 WL 897860 (2d Cir. 2006)	T		117	W	D	A	G	
U.S. v. Fernandez, 443 F.3d 19 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Tejada-Hilliano, 2006 WL 897767 (2d Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Victoria, 2006 WL 760136 (2d Cir. 2006)	D		165	W	D	A	G	
U.S. v. Folkes, 2006 WL 755955 (2d Cir. 2006)	D		55	W	D	A	G	
U.S. v. Beckett, 2006 WL 544487 (2d Cir. 2006)	F		70	W	D	A	G	
U.S. v. Smith, 2006 WL 522082 (2d Cir. 2006)	I		57	W	D	A	G	
U.S. v. Perez, 2006 WL 482557 (2d Cir. 2006)	D		292	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Harris, 2006 WL 374205 (2d Cir. 2006)	T		63	W	D	A	G	
U.S. v. Munroe, 2006 WL 354640 (2d Cir. 2006)	I	77-96	89	W	D	A	G	
U.S. v. Collins, 2006 WL 231666 (2d Cir. 2006)	D		151	W	D	A	G	
U.S. v. Claudillo-Marquez, 2006 WL 224182 (2d Cir. 2006)	I		77	W	D	A	G	
U.S. v. Emence, 2006 WL 189999 (2d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Nash, 2006 WL 3147563 (2d Cir. 2006)	D		140	W	D	A	G	
U.S. v. Wilson, 2006 WL 3026162 (2d Cir. 2006)	D		200	W	D	A	G	
U.S. v. Khan, 2006 WL 268668 (2d. Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Marshall, 2006 WL 1788492 (2d Cir. 2006)	I		60	W	D	A	G	
U.S. v. Sow, 2006 WL 1318798 (2d Cir. 2006)	O	41-51	51	W	D	A	G	
U.S. v. Celaya-Romo, 2006 WL 1236329 (2d Cir. 2006)	D		168	W	D	A	G	
U.S. v. Castro, 2006 WL 958290 (2d Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Agnew, 2006 WL 707482 (2d Cir. 2006)	T		21	W	D	A	G	
U.S. v. Vargas, 2006 WL 700928 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Rajotte, 2006 WL 616314 (2d Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Navarro, 2006 WL 3263834 (2d Cir. 2006)	T	57-71	57	W	D	A	G	
U.S. v. Dorney, 2006 WL 2919021 (2d Cir. 2006)	I		89	W	D	A	G	
U.S. v. Ellis, 2006 WL 2990202 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Wusebio, 2006 WL 2973010 (2d Cir. 2006)	I			W	D	A	G	
U.S. v. Watson, 2006 WL 266527 (2d Cir. 2006)	F, D		130	W	D	A	G	
U.S. v. Gamble, 2006 WL 3253087 (2d Cir. 2006)	D		216	W	D	A	G	
U.S. v. Fernandez, 2006 WL 3298426 (2d Cir. 2006)	I		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ventura-Mejia, 2006 WL 3308205 (2d Cir. 2006)	I			W	D	A	G	
U.S. v. Drayton, 2006 WL 3307754 (2d Cir. 2006)	I	57-71	71	W	D	A	G	
U.S. v. Meija, 2006 WL 3326757 (2d Cir. 2006)	D		292	W	D	A	G	
U.S. v. Capozzi, 2006 WL 3307631 (2d Cir. 2006)	T		37	W	D	A	G	
U.S. v. Toohey, 448 F.3d 542 (2d Cir. 2006)	O	15-21	15	W	D	R	D	P

THIRD CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Brown, 2006 WL 3090333 (3d Cir. 2006)	T	70-87	90	A	D	A	G	
U.S. v. King, 2006 WL 2189683 (3d Cir. 2006)	S	27-33	40	A	D	A	G	
U.S. v. Powell, 2006 WL 2135049 (3d Cir. 2006)	T	41-51	56	A	D	A	G	
U.S. v. King, 454 F.3d 187 (3d Cir. 2006)	T	30-37	72	A	D	A	G	
U.S. v. Schweitzer, 454 F.3d 197 (3d Cir. 2006)	T	46-57	84	A	D	A	G	
U.S. v. Sparks, 184 Fed. Appx. 185 (3d Cir. 2006)	O	70-87	120	A	D	A	G	
U.S. v. Rose, 176 Fed. Appx. 295 (3d Cir. 2006)	O	4-10	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Burke, 176 Fed. Appx. 304 (3d Cir. 2006)	O	8-14	17	A	D	A	G	
U.S. v. Robinson, 174 Fed. Appx. 72 (3d Cir. 2006)	O	24-30	60	A	D	A	G	
U.S. v. Cropper, 168 Fed. Appx. 503 (3d Cir. 2006)	F	51-63	72	A	D	A	G	
Nabried v. U.S., 2006 WL 2474026 (3d Cir. 2006)	D	151-188	110	B	D	A	G	
U.S. v. Amos, 2006 WL 2384927 (3d Cir. 2006)	D	188-235	140	B	D	A	G	
U.S. v. Flores, 454 F.3d 149 (3d Cir. 2006)	T	70-87	32	B	D	A	G	
U.S. v. Gordon, 185 Fed. Appx. 192 (3d Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. Brantley, 184 Fed. Appx. 258 (3d Cir. 2006)	T	151-188	144	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Baskerville, 181 Fed. Appx. 199 (3d Cir. 2006)	O	130-?	100	B	D	A	G	
U.S. v. Seaton, 178 Fed. Appx. 172 (3d Cir. 2006)	D	322-387	240	B	D	A	G	
U.S. v. Tyson, 176 Fed. Appx. 255 (3d Cir. 2006)	D	292-365	200	B	D	A	G	
U.S. v. Cepeda, 181 Fed. Appx. 177 (3d Cir. 2006)	D	57-71	45	B	D	A	G	
U.S. v. Walker, 172 Fed. Appx. 460 (3d Cir. 2006)	D		120	B	D	A	G	
U.S. v. Sargeant, 171 Fed. Appx. 954 (3d Cir. 2006)	F	210-262	120	B	D	A	G	
U.S. v. Giaguinto, 441 F.3d 195 (3d Cir. 2006)	D	30-?	27	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ricciotti, 170 Fed. Appx. 800 (3d Cir. 2006)	D	30-?	23	B	D	A	G	
U.S. v. Nunez, 173 Fed. Appx. 128 (3d Cir. 2006)	D	235-293	216	B	D	A	G	
U.S. v. Jackson, 169 Fed. Appx. 120 (3d Cir. 2006)	O	10-16	6	B	D	A	G	
U.S. v. Wilson, 2006 WL 3090125 (3d Cir. 2006)	T	84-105	72	B	D	A	G	
U.S. v. Millard, 184 Fed. Appx. 226 (3d Cir. 2006)	D	151-188	130	B	D	A	G	
U.S. v. Miles, 184 Fed. Appx. 222 (3d Cir. 2006)	D	100-120	87	B	D	A	G	
U.S. v. Hyung Pil Baek, 181 Fed. Appx. 165 (3d Cir. 2006)	T	70-87	24	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Benjamin, 2006 WL 3227881 (3d Cir. 2006)	T		39	W	D	A	G	
U.S. v. Hertzog, 186 Fed. Appx. 314 (3d Cir. 2006)	F		70	W	D	A	G	
U.S. v. Armstead, 185 Fed. Appx. 211 (3d Cir. 2006)	D		120	W	D	A	G	
U.S. v. Barron, 181 Fed. Appx. 269 (3d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Skiba, 178 Fed. Appx. 159 (3d Cir. 2006)	O		240	W	D	A	G	
U.S. v. Thomas, 174 Fed. Appx. 1 (3d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Jackson, 2006 WL 3247919 (3d Cir. 2006)	O	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Charles, ---F.3d---, 2006 WL 3231396 (3d Cir. 2006)	O	37-46	46	W	D	A	G	
U.S. v. Cooley, 2006 WL 3227764 (3d Cir. 2006)	D	?-Life	Life	W	D	A	G	
U.S. v. Dees, ---F.3d---, 2006 WL 3209989 (3d Cir. 2006)	T	24-72	72	W	D	A	G	
U.S. v. Paz, 2006 WL 3201104 (3d Cir. 2006)	T			W	D	A	G	
U.S. v. Fowers, 2006 WL 3147204 (3d Cir. 2006)	S	78-97	85	W	D	A	G	
U.S. v. Gavin, 2006 WL 3079013 (3d Cir. 2006)	D	?-480	125	W	D	A	G	
U.S. v. Lyons, 2006 WL 3057558 (3d Cir. 2006)	D	70-87	70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tirado, 2006 WL 3024701 (3d Cir. 2006)	F	100-120	120	W	D	A	G	
U.S. v. Rodriguez-Sanchez, 2006 WL 2882078 (3d Cir. 2006)	D	?-Life	250	W	D	A	G	
U.S. v. Nesgoda, 2006 WL 2871273 (3d Cir. 2006)	O		120	W	D	A	G	
U.S. v. Neary, 2006 WL 2871275 (3d Cir. 2006)	T	151-188	170	W	D	A	G	
U.S. v. Henry, 2006 WL 2849651 (3d Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Samuelsen, 2006 WL 2826730 (3d Cir. 2006)	T	37-51	37	W	D	A	G	
U.S. v. Grasso, 2006 WL 2726500 (3d Cir. 2006)	T		107	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Outram, 2006 WL 2673288 (3d Cir. 2006)	I		57	W	D	A	G	
U.S. v. Parker, 462 F.3d 273 (3d Cir. 2006)	D	360-Life	349 (11 credit for time served)	W	D	A	G	
U.S. v. Hodge, 2006 WL 2400946 (3d Cir. 2006)	D	151-188	166	W	D	A	G	
U.S. v. Muhammad, 2006 WL 2189798 (3d Cir. 2006)	F	110-137	120	W	D	A	G	
U.S. v. Burtula, 2006 WL 2167586 (3d Cir. 2006)	T	37-46	37	W	D	A	G	
U.S. v. Purdie, 2006 WL 2092446 (3d Cir. 2006)	T	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McIntyre, 186 Fed. Appx. 328 (3d Cir. 2006)	T	57-71	63	W	D	A	G	
U.S. v. Veneziale, 2006 WL 2076156 (3d Cir. 2006)	O	108-135	120	W	D	A	G	
U.S. v. Felix, 2006 WL 2051677 (3d Cir. 2006)	D		60	W	D	A	G	
U.S. v. Severino, 454 F.3d 206 (3d Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Mornan, 186 Fed. Appx. 192 (3d Cir. 2006)	T	97-121	120	W	D	A	G	
U.S. v. Sanders, 185 Fed. Appx. 176 (3d Cir. 2006)	T		183	W	D	A	G	
U.S. v. Taylor, 184 Fed. Appx. 146 (3d Cir. 2006)	D		335	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Newman, 186 Fed. Appx. 264 (3d Cir. 2006)		235-293	293	W	D	A	G	
U.S. v. Marshall, 186 Fed. Appx. 246 (3d Cir. 2006)	D	151-188	168	W	D	A	G	
U.S. v. Shusterman, 184 Fed. Appx. 224 (3d Cir. 2006)	T	51-63	51	W	D	A	G	
U.S. v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 2006)	S		210	W	D	A	G	
U.S. v. Long, 183 Fed. Appx. 182 (3d Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Briscoe-Bey, 182 Fed. Appx. 68 (3d Cir. 2006)	D	151-188	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bonilla Velasquez, 182 Fed. Appx. 120 (3d Cir. 2006)	I	77-96	85	W	D	A	G	
U.S. v. Clark, 182 Fed. Appx. 117 (3d Cir. 2006)	D	92-96	92	W	D	A	G	
U.S. v. Festus, 181 Fed. Appx. 147 (3d Cir. 2006)	O		105	W	D	A	G	
U.S. v. Kosek, 183 Fed. Appx. 174 (3d Cir. 2006)	F	70-87	86	W	D	A	G	
U.S. v. Eiswerth, 181 Fed. Appx. 175 (3d Cir. 2006)	D	46-57	46	W	D	A	G	
U.S. v. Efigenio, 183 Fed. Appx. 165 (3d Cir. 2006)	I	41-50	41	W	D	A	G	
U.S. v. Jarrett, 181 Fed. Appx. 233 (3d Cir. 2006)	F	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Able, 182 Fed. Appx. 77 (3d Cir. 2006)	I	18-24	18	W	D	A	G	
U.S. v. Thomas, 181 Fed. Appx. 188 (3d Cir. 2006)	D	46-57	46	W	D	A	G	
U.S. v. Braun, 180 Fed. Appx. 351 (3d Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Rene, 180 Fed. Appx. 339 (3d Cir. 2006)	F	51-63	57	W	D	A	G	
U.S. v. Carroll, 179 Fed. Appx. 128 (3d Cir. 2006)	S	140-175	175	W	D	A	G	
U.S. v. Stewart, 179 Fed. Appx. 814 (3d Cir. 2006)	D	360-Life	Life	W	D	A	G	
U.S. v. Kossak, 178 Fed. Appx. 183 (3d Cir. 2006)	T	57-71	60	W	D	A	G	
U.S. v. Pena, 177 Fed. Appx. 257 (3d Cir. 2006)	D	57-71	60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 178 Fed. Appx. 140 (3d Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Gray, 176 Fed. Appx. 315 (3d Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Rackley, 175 Fed. Appx. 564 (3d Cir. 2006)	O	78-97	90	W	D	A	G	
U.S. v. McNeal, 175 Fed. Appx. 546 (3d Cir. 2006)	F	18-24	18	W	D	A	G	
U.S. v. Reed, 173 Fed. Appx. 184 (3d Cir. 2006)	F	63-78	78	W	D	A	G	
U.S. v. Gomez-Fonseca, 171 Fed. Appx. 957 (3d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Boyd, 173 Fed. Appx. 139 (3d Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Veshio, 174 Fed. Appx. 63 (3d Cir. 2006)	T	151-188	170	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dair, 174 Fed. Appx. 68 (3d Cir. 2006)	D	324-405	325	W	D	A	G	
U.S. v. Weaver, 175 Fed. Appx. 506 (3d Cir. 2006)	O	30-37	36	W	D	A	G	
U.S. v. Reyes, 169 Fed. Appx. 115 (3d Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Knighton, 171 Fed. Appx. 939 (3d Cir. 2006)	T	70-87	70	W	D	A	G	
U.S. v. Cooper, 437 F.3d 324 (3d Cir. 2006)	D	84-105	105	W	D	A	G	
U.S. v. Riddle, 174 Fed. Appx. 662 (3d Cir. 2006)	D	41-51	42	W	D	A	G	
U.S. v. Gunter, 462 F.3d 237 (3d Cir. 2006)	D	295-353	295	W	D	R	D	P
U.S. v. Webb, 2006 WL 2974124 (3d Cir. 2006)	F			W	D	A	G	

FOURTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Carpenter, 2006 WL 2986548 (4th Cir. 2006)	F	15-21	30	A	D	A	G	
U.S. v. Robinson, 2006 WL 2794398 (4th Cir. 2006)	O	8-14	24	A	D	A	G	
U.S. v. Smiley, 2006 WL 2347625 (4th Cir. 2006)	T	84-105	120	A	D	A	G	
U.S. v. Smith, 2006 WL 2347524 (4th Cir. 2006)	D		60	A	D	A	G	
U.S. v. Crudup, 461 F.3d 433 (4th Cir. 2006)	O	5-11	36	A	D	A	G	
U.S. v. Spain, 2006 WL 1627248 (4th Cir. 2006)	O		61	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hall, 2006 WL 1307881 (4th Cir. 2006)	T	4-10	20	A	D	A	G	
U.S. v. Betanzos-Flores, 2006 WL 392068 (4th Cir. 2006)	I	21-27	30	A	D	A	G	
U.S. v. Ferguson, 2006 WL 786817 (4th Cir. 2006)	D		765	A	D	A	G	
U.S. v. Davenport, 445 F.3d 366 (4th Cir. 2006)	T	30-37	120	A	D	R	D	S
U.S. v. Canady, 2006 WL 2686625 (4th Cir. 2006)	D		315	B	D	A	G	
U.S. v. Canady, 2006 WL 2688869 (4th Cir. 2006)	D		248	B	D	A	G	
U.S. v. Canady, 2006 WL 2620153 (4th Cir. 2006)	D, F		200	B	D	A	G	
U.S. v. Marcum, 2006 WL 2591917 (4th Cir. 2006)	T	63-78	60	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Basurto, 2006 WL 2520317 (4th Cir. 2006)	D		180	B	D	A	G	
U.S. v. Bonnie, 2006 WL 2492161 (4th Cir. 2006)	D			B	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006) (defendant D. Zimmerman)	T	135-?	120	B	D	A	G	
U.S. v. Davis, 2006 WL 2076447 (4th Cir. 2006)	D	210-262	188	B	D	A	G	
U.S. v. Guffey, 2006 WL 1828012 (4th Cir. 2006)	S	121-151	96	B	D	A	G	
U.S. v. Katz, 2006 WL 1636740 (4th Cir. 2006)	T	97-121	72	B	D	A	G	
U.S. v. Wishon, 2006 WL 1443698 (4th Cir. 2006)	F	121-150	100	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thompson, 2006 WL 1233245 (4th Cir. 2006)	T	24-30	15	B	D	A	G	
U.S. v. Woods, 2006 WL 538030 (4th Cir. 2006)	O		320	B	D	A	G	
U.S. v. Santos, 2006 WL 476620 (4th Cir. 2006)	F		168	B	D	A	G	
U.S. v. Hampton, 441 F.3d 284 (4th Cir. 2006)	F	57-71	36	B	G	R	G	S
U.S. v. Curry, 461 F.3d 452 (4th Cir. 2006)	T	41-51	12	B	G	R	G	S
U.S. v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006)	I	37-46	24	B	G	R	G	S
U.S. v. Kimbrough, 2006 WL 1233525 (4th Cir. 2006)	D	168-210	120	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Eura, 440 F.3d 625 (4th Cir. 2006)	D	78-97	60	B	G	R	G	S
U.S. v. Clark, 434 F.3d 684 (4th Cir. 2006)	D	46-57	8	B	G	R	G	S
U.S. v. Williams, 2006 WL 3026266 (4th Cir. 2006)	D	97-121	6	B	G	R	D	S
U.S. v. Khan, 461 F.3d 477 (4th Cir. 2006)	O	97-121	52	B	G	R	G	S
U.S. v. Moreland, 437 F.3d 424 (4th Cir. 2006)	D	360-life	120	B	G	R	G	S
U.S. v. Shore, 2006 WL 241368 (4th Cir. 2006)	F	130-162	120	stat max	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006) (defendant P. Zimmerman)	T	168-?	132	stat max	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 444 F.3d 250 (4th Cir. 2006)	T	77-96	60	stat max	D	A	G	
U.S. v. Deberry, 2006 WL 871281 (4th Cir. 2006)	F		120	stat max	D	A	G	
U.S. v. Dowtin, 2006 WL 655079 (4th Cir. 2006)	F		44	W	D	A	G	
U.S. v. Esposito, 2006 WL 3327804 (4th Cir. 2006)	T			W	D	A	G	
U.S. v. Owens, 2006 WL 3327588 (4th Cir. 2006)	D	262-327	300	W	D	A	G	
U.S. v. Dumas, 2006 WL 3311504 (4th Cir. 2006)	O		15	W	D	A	G	
U.S. v. Perez-Mendez, 2006 WL 3313359 (4th Cir. 2006)	D		168	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Davis, 2006 WL 3267349 (4th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Stanback, 2006 WL 3253931 (4th Cir. 2006)	D		420	W	D	A	G	
U.S. v. Phillips, 2006 WL 3207969 (4th Cir. 2006)	F		24	W	D	A	G	
U.S. v. Phelps, 2006 WL 3147514 (4th Cir. 2006)	D, F	262-327	262	W	D	A	G	
U.S. v. Lutz, 2006 WL 3077440 (4th Cir. 2006)	S		65	W	D	A	G	
U.S. v. Wimbush, 2006 WL 3055494 (4th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Hill, 2006 WL 3069471 (4th Cir. 2006)	D		188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Shields, 2006 WL 3026305 (4th Cir. 2006)	F	110-120	120	W	D	A	G	
U.S. v. Brown, 2006 WL 3025749 (4th Cir. 2006)	O, F		300	W	D	A	G	
U.S. v. Minter, 2006 WL 3018109 (4th Cir. 2006)	D		41	W	D	A	G	
U.S. v. Brown, 2006 WL 3018104 (4th Cir. 2006)	F			W	D	A	G	
U.S. v. Barajas, 2006 WL 2974323 (4th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Rutland, 2006 WL 2974333 (4th Cir. 2006)	D	235-298	235	W	D	A	G	
U.S. v. Naranjo, 2006 WL 2953366 (4th Cir. 2006)	I	57-71	62	W	D	A	G	
U.S. v. Plaismond, 2006 WL 2953400 (4th Cir. 2006)	D	168-210	168	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Anthony, 2006 WL 2930145 (4th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Anthony, 2006 WL 2930145 (4th Cir. 2006) (defendant Scott)	D		360	W	D	A	G	
U.S. v. Carter, 2006 WL 2930143 (4th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Lee, 2006 WL 2853975 (4th Cir. 2006)	F	57-71	71	W	D	A	G	
U.S. v. Kafka-Banderas, 2006 WL 2846458 (4th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Plumber, 2006 WL 2846453 (4th Cir. 2006)	T	27-33	31	W	D	A	G	
U.S. v. Haynes, 2006 WL 2817656 (4th Cir. 2006)	D	188-235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Malloy, 2006 WL 2817657 (4th Cir. 2006)	F		188	W	D	A	G	
U.S. v. Luck, 2006 WL 2711929 (4th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Johnson, 2006 WL 2711976 (4th Cir. 2006)	F		161	W	D	A	G	
U.S. v. Dominguez-Villegas, 2006 WL 2668682 (4th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Garcia-Arzate, 2006 WL 2640242 (4th Cir. 2006)	D		156	W	D	A	G	
U.S. v. Stroupe, 2006 WL 2620209 (4th Cir. 2006)	T		57	W	D	A	G	
U.S. v. Patterson, 2006 WL 2620174 (4th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Andaya-Penalosa, 2006 WL 2562322 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Connor, 2006 WL 2547960 (4th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Little, 2006 WL 2527670 (4th Cir. 2006)	F		72	W	D	A	G	
U.S. v. Moss, 2006 WL 2520299 (4th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Sanders, 2006 WL 2520308 (4th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Myrick, 2006 WL 2465326 (4th Cir. 2006)	D	100-125	100	W	D	A	G	
U.S. v. Plata-Oceguera, 2006 WL 2460860 (4th Cir. 2006)	I		54	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Frost, 2006 WL 2433961 (4th Cir. 2006)	D, F	235-293	235	W	D	A	G	
U.S. v. Vasquez, 2006 WL 2460750 (4th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Whitlock, 2006 WL 2433985 (4th Cir. 2006)	O	7-13	13	W	D	A	G	
U.S. v. Epperson, 2006 WL 2457154 (4th Cir. 2006)	F		33	W	D	A	G	
U.S. v. Pankey, 2006 WL 2457166 (4th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Craig, 2006 WL 2347648 (4th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Williams, 2006 WL 2347518 (4th Cir. 2006)	D	78-97	97	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 2006 WL 2335547 (4th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Baker, 2006 WL 2277730 (4th Cir. 2006)	F	110-120	110	W	D	A	G	
U.S. v. Battles, 2006 WL 2141222 (4th Cir. 2006)	T	97-121	97	W	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006)	T	235-293	252	W	D	A	G	
U.S. v. Gibbs, 2006 WL 2142076 (4th Cir. 2006)	T			W	D	A	G	
U.S. v. Fuller, 2006 WL 2092537 (4th Cir. 2006)	T, F		84/60	W	D	A	G	
U.S. v. Noe, 2006 WL 2076444 (4th Cir. 2006)	T	78-97	78	W	D	A	G	
U.S. v. Roussos, 2006 WL 2076453 (4th Cir. 2006)	D		360	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Oglesby, 2006 WL 2076453 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. McDonald, 2006 WL 2076451 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Hayward, 2006 WL 2052073 (4th Cir. 2006)	F		38	W	D	A	G	
U.S. v. King, 2006 WL 2044878 (4th Cir. 2006)	T	41-51	41	W	D	A	G	
U.S. v. Billingsley, 2006 WL 2044850 (4th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Price, 2006 WL 2044850 (4th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Overstreet, 2006 WL 2010850 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Shipman, 2006 WL 2010843 (4th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Dublin, 2006 WL 1956414 (4th Cir. 2006)	D	life	life	W	D	A	G	
U.S. v. Brooks, 2006 WL 1971628 (4th Cir. 2006)	F		87	W	D	A	G	
U.S. v. Louis, 2006 WL 1971622 (4th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Hailey, 2006 WL 1920017 (4th Cir. 2006)	F	180-210	190	W	D	A	G	
U.S. v. Statts, 2006 WL 1918956 (4th Cir. 2006)	D, F	84-105	84	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Daniels, 2006 WL 1888823 (4th Cir. 2006)	D, T		360	W	D	A	G	
U.S. v. Dailey, 2006 WL 1888880 (4th Cir. 2006)	D, F		78	W	D	A	G	
U.S. v. Discua, 2006 WL 1888828 (4th Cir. 2006)	T	135-168	151	W	D	A	G	
U.S. v. Shull, 2006 WL 1880194 (4th Cir. 2006)	T	15-21	21	W	D	A	G	
U.S. v. Sehen, 2006 WL 1867372 (4th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Marrs, 2006 WL 1868493 (4th Cir. 2006)	D		41	W	D	A	G	
U.S. v. Gordy, 2006 WL 1877212 (4th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Goodline, 2006 WL 1877214 (4th Cir. 2006)	F	77-96	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 2006 WL 1817100 (4th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Washington, 2006 WL 1819026 (4th Cir. 2006)	F	100-125	100	W	D	A	G	
U.S. v. Ollivierre, 2006 WL 1792739 (4th Cir. 2006)	D	210-262	210	W	D	A	G	
U.S. v. Thomas, 2006 WL 1835942 (4th Cir. 2006)	D	262-327	270	W	D	A	G	
U.S. v. Young, 2006 WL 1835971 (4th Cir. 2006)	O	7-13	10	W	D	A	G	
U.S. v. Adolphus, 2006 WL 1835948 (4th Cir. 2006)	F	92-115	115	W	D	A	G	
U.S. v. Esparza, 2006 WL 1835964 (4th Cir. 2006)	I	77-96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perry, 2006 WL 1835955 (4th Cir. 2006)	O		19	W	D	A	G	
U.S. v. Brown, 2006 WL 1766743 (4th Cir. 2006)	T	78-97	78	W	D	A	G	
U.S. v. Staine, 2006 WL 1766122 (4th Cir. 2006) (defendant Joseph)	D		262	W	D	A	G	
U.S. v. Benavides, 2006 WL 1766121 (4th Cir. 2006)	I	33-41	33	W	D	A	G	
U.S. v. Florence, 2006 WL 1722492 (4th Cir. 2006)	D		268	W	D	A	G	
U.S. v. Hodge, 2006 WL 1722496 (4th Cir. 2006)	F		27	W	D	A	G	
U.S. v. Adams, 2006 WL 1667454 (4th Cir. 2006)	F	92-115	115	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bustos-Serrano, 2006 WL 1676313 (4th Cir. 2006)	D	168-210	175	W	D	A	G	
U.S. v. Nichols, 2006 WL 1676334 (4th Cir. 2006)	D, F	188-235	190	W	D	A	G	
U.S. v. Briggs, 2006 WL 1642643 (4th Cir. 2006)	O		8	W	D	A	G	
U.S. v. De La Rosa, 2006 WL 1642630 (4th Cir. 2006)	I	46-57	52	W	D	A	G	
U.S. v. Lowe, 2006 WL 1642639 (4th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Barrett, 2006 WL 1627266 (4th Cir. 2006)	F	41-51	41	W	D	A	G	
U.S. v. Timmons, 2006 WL 1627234 (4th Cir. 2006)	D, F		235, 120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Manns, 2006 WL 1627271 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Christian, 2006 WL 1582706 (4th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Hammonds, 2006 WL 1582710 (4th Cir. 2006)	T		300	W	D	A	G	
U.S. v. Graves, 2006 WL 1541150 (4th Cir. 2006)	O	37-46	37	W	D	A	G	
U.S. v. Garcia-Uribe, 2006 WL 1476923 (4th Cir. 2006)	D	135-168	160	W	D	A	G	
U.S. v. Moore, 2006 WL 1476890 (4th Cir. 2006)	T		216	W	D	A	G	
U.S. v. Eaves, 2006 WL 1476922 (4th Cir. 2006)	T		165	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Owens, 2006 WL 1476915 (4th Cir. 2006)	F		100	W	D	A	G	
U.S. v. Caldwell, 2006 WL 1476185 (4th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Billings, 2006 WL 1476872 (4th Cir. 2006)	D	360-480	360	W	D	A	G	
U.S. v. Lepe-Rodriguez, 2006 WL 1476188 (4th Cir. 2006)	I		63	W	D	A	G	
U.S. v. Fowler, 2006 WL 1476180 (4th Cir. 2006)	F		27	W	D	A	G	
U.S. v. Harmer, 2006 WL 1444592 (4th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Dowell, 2006 WL 1408323 (4th Cir. 2006)	D	188-235	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 2006 WL 1373183 (4th Cir. 2006)	F	37-46	37	W	D	A	G	
U.S. v. Bryant, 2006 WL 1328692 (4th Cir. 2006)	D,F		420	W	D	A	G	
U.S. v. Shatley, 448 F.3d 264 (4th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Miles, 2006 WL 1328690 (4th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Harbin, 2006 WL 1308637 (4th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Kirk, 2006 WL 1308640 (4th Cir. 2006)	D		51	W	D	A	G	
U.S. v. Espinoza-Barreto, 2006 WL 1233935 (4th Cir. 2006)	I		68	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Oglesbee, 2006 WL 1144512 (4th Cir. 2006)	O		life	W	D	A	G	
U.S. v. Sanchez, 2006 WL 1144514 (4th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Wallace, 2006 WL 1144497 (4th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Navarette-Beltran, 2006 WL 1144495 (4th Cir. 2006)	I	57-71	71	W	D	A	G	
U.S. v. Wilfoung, 2006 WL 1144515 (4th Cir. 2006)	D	210-262	210	W	D	A	G	
U.S. v. Rita, 2006 WL 1144508 (4th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Tyler, 2006 WL 1144520 (4th Cir. 2006)	F	24-30	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera-Magana, 2006 WL 1144511 (4th Cir. 2006)	I	27-33	27	W	D	A	G	
U.S. v. Bowman, 2006 WL 1130901 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Leggett, 2006 WL 1130904 (4th Cir. 2006)	D		165	W	D	A	G	
U.S. v. Allen, 2006 WL 1114117 (4th Cir. 2006)	F		108	W	D	A	G	
U.S. v. Canady, 2006 WL 1112824 (4th Cir. 2006)	D		136	W	D	A	G	
U.S. v. Myers, 2006 WL 1068980 (4th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Allen, 2006 WL 1068979 (4th Cir. 2006)	F	92-115	110	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Belser, 2006 WL 1005011 (4th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Burress, 2006 WL 1005015 (4th Cir. 2006)	F		210	W	D	A	G	
U.S. v. Daniels, 2006 WL 1005013 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Parker, 2006 WL 994442 (4th Cir. 2006)	D, F	308-355	324	W	D	A	G	
U.S. v. Coaxum, 2006 WL 980796 (4th Cir. 2006)	S		12	W	D	A	G	
U.S. v. Johnson, 445 F.3d 339 (4th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Divine, 2006 WL 908743 (4th Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
(4th Cir. 2006)(Apr. 6, 2006 4th Cir.)	D		180	W	D	A	G	
U.S. v. Fitch, 2006 WL 889580 (4th Cir. 2006)	D		75	W	D	A	G	
U.S. v. Juarez-Huarte, 2006 WL 889470 (4th Cir. 2006)	I	27-33	27	W	D	A	G	
U.S. v. Battle, 2006 WL 889794 (4th Cir. 2006)	O	120-150	150	W	D	A	G	
U.S. v. Mason, 2006 WL 889573 (4th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Patton, 2006 WL 871290 (4th Cir. 2006)	T	30-37	37	W	D	A	G	
U.S. v. Monahan, 2006 WL 870590 (4th Cir. 2006)	F	30-37	30	W	D	A	G	
U.S. v. Moore, 2006 WL 871065 (4th Cir. 2006)	F		37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dove, 2006 WL 870582 (4th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Green, 2006 WL 786816 (4th Cir. 2006)	T		70	W	D	A	G	
U.S. v. Southern, 2006 WL 786812 (4th Cir. 2006)	O		320	W	D	A	G	
U.S. v. Robinson, 2006 WL 775088 (4th Cir. 2006)	O		4	W	D	A	G	
U.S. v. Robinson, 2006 WL 775088 (4th Cir. 2006)	T		18	W	D	A	G	
U.S. v. Gutierrez-Piza, 2006 WL 751521 (4th Cir. 2006)	I	30-37	37	W	D	A	G	
U.S. v. Rivera-Cruz, 2006 WL 694371 (4th Cir. 2006)	T		12	W	D	A	G	
U.S. v. Wallace, 2006 WL 690967 (4th Cir. 2006)	F		180	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez-Pineda, 2006 WL 678953 (4th Cir. 2006)	I		71	W	D	A	G	
U.S. v. Lewis, 2006 WL 678932 (4th Cir. 2006)	O	120-150	150	W	D	A	G	
U.S. v. Keitt, 2006 WL 678946 (4th Cir. 2006)	O		41	W	D	A	G	
U.S. v. McNair, 2006 WL 678936 (4th Cir. 2006)	F	37-46	37	W	D	A	G	
U.S. v. Gause, 2006 WL 615903 (4th Cir. 2006)	D			W	D	A	G	
U.S. v. Bruton, 2006 WL 558990 (4th Cir. 2006)	D, F			W	D	A	G	
U.S. v. Caldwell, 2006 WL 538097 (4th Cir. 2006)	O	18-24	24	W	D	A	G	
U.S. v. Smoot, 2006 WL 525496 (4th Cir. 2006)	D	121-151	136	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Blythe, 2006 WL 487811 (4th Cir. 2006)	O		8	W	D	A	G	
U.S. v. Williams, 2006 WL 487156 (4th Cir. 2006)	F		48	W	D	A	G	
U.S. v. Krizanovic, 2006 WL 485515 (4th Cir. 2006)	O		46	W	D	A	G	
U.S. v. Shultz, 2006 WL 435837 (4th Cir. 2006)	O		46	W	D	A	G	
U.S. v. Good, 2006 WL 448906 (4th Cir. 2006)	F	235-293	252	W	D	A	G	
U.S. v. Bennett, 2006 WL 372636 (4th Cir. 2006)	F		30	W	D	A	G	
U.S. v. O'Briant, 2006 WL 372638 (4th Cir. 2006)	T		27	W	D	A	G	
U.S. v. Brown, 2006 WL 372639 (4th Cir. 2006)	F		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gaynor, 2006 WL 372622 (4th Cir. 2006)	D	84-100	95	W	D	A	G	
U.S. v. Haskins, 2006 WL 314465 (4th Cir. 2006)	D, F		240	W	D	A	G	
U.S. v. France, 2006 WL 285614 (4th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Camara, 2006 WL 237092 (4th Cir. 2006)	T	10-16	10	W	D	A	G	
U.S. v. McDaniels, 2006 WL 2288717 (4th Cir. 2006)	F		46	W	D	A	G	
U.S. v. Blanks, 2006 WL 199479 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Haston, 2006 WL 177565 (4th Cir. 2006)	D		37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Martinez-Flores, 2006 WL 189953 (4th Cir. 2006)	F		24	W	D	A	G	
U.S. v. Guzman-Balbuena, 2006 WL 172284 (4th Cir. 2006)	I		70	W	D	A	G	
U.S. v. McClelland, 2006 WL 172250 (4th Cir. 2006)	D		57	W	D	A	G	
U.S. v. Cox, 2006 WL 172289 (4th Cir. 2006)	F	37-46	40	W	D	A	G	
U.S. v. Cunningham, 2006 WL 149066 (4th Cir. 2006)	O		185	W	D	A	G	
U.S. v. Phillips, 2006 WL 26117 (4th Cir. 2006) (defendant Ziegler)	D			W	D	A	G	
U.S. v. Fox, 2006 WL 15381 (4th Cir. 2006)	D		41	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dawkins, 2006 WL 10895 (4th Cir. 2006)	F		64	W	D	A	G	
U.S. v. Barrett, 2006 WL 2992902 (4th Cir. 2006)	F		120	W	D	A	G	
U.S. v. Dennis, 2006 WL 2918748 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Faulks, 2006 WL 2683300 (4th Cir. 2006)	O		36	W	D	A	G	
U.S. v. Dinnall, 2006 WL 1766122 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Staine, 2006 WL 1766122 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Hardnett, 2006 WL 1446284 (4th Cir. 2006)	D		392	W	D	A	G	
U.S. v. Johnson, 2006 WL 487329 (4th Cir. 2006)	O		30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dewalt, 2006 WL 149087 (4th Cir. 2006)	O		16	W	D	A	G	
U.S. v. Roy, 2006 WL 1307867 (4th Cir. 2006)	O		60	W	D	A	G	

FIFTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Corley, 2006 WL 3019195 (5th Cir. 2006)	F			A	D	A	G	
U.S. v. Roach, 2006 WL 2861802 (5th Cir. 2006)	F	37-46	60	A	D	A	G	
U.S. v. Angleton, 2006 WL 2828657 (5th Cir. 2006)	T		60	A	D	A	G	
U.S. v. Day, 2006 WL 2692575 (5th Cir. 2006)	T		120	A	D	A	G	
U.S. v. Weese, 2006 WL 2590309 (5th Cir. 2006)	O		24	A	D	A	G	
U.S. v. Shankin, 2006 WL 2337947 (5th Cir. 2006)	T	15-21	60	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hoyos, 181 Fed.Appx. 479 (5th Cir. 2006)	D		28	A	D	A	G	
U.S. v. Miranda-Echartea, 188 Fed.Appx. 298 (5th Cir. 2006)	D		70	A	D	A	G	
U.S. v. Rios-Joaquina, 188 Fed.Appx. 286 (5th Cir. 2006)	I		60	A	D	A	G	
U.S. v. Collins, 188 Fed.Appx. 266 (5th Cir. 2006)	F	51-63	72	A	D	A	G	
U.S. v. Clements, 188 Fed.Appx. 267 (5th Cir. 2006)	T	57-71	84	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Salinas, 187 Fed.Appx. 396 (5th Cir. 2006)	D	135-168	240	A	D	A	G	
U.S. v. Jones, 182 Fed.Appx. 343 (5th Cir. 2006)	O		24	A	D	A	G	
U.S. v. Howard, 179 Fed.Appx. 233 (5th Cir. 2006)	F	approx. 40	84	A	D	A	G	
U.S. v. Gentry, 178 Fed.Appx. 435 (5th Cir. 2006)	T	151-188	240	A	D	A	G	
U.S. v. Taylor, 179 Fed.Appx. 226 (5th Cir. 2006)	F	77-96	120	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 176 Fed.Appx. 625 (5th Cir. 2006)	T	63-78	96	A	D	A	G	
U.S. v. Negron Cabrera, 174 Fed.Appx. 856 (5th Cir. 2006)	O		114	A	D	A	G	
U.S. v. Jones, 444 F.3d 430 (5th Cir. 2006)	S	46-57	120	A	D	A	G	
U.S. v. Reinhart, 442 F.3d 857 (5th Cir. 2006)	S	121-151	235	A	D	A	G	
U.S. v. Smith, 440 F.3d 704 (5th Cir. 2006)	F	21-27	60	A	D	A	G	
U.S. v. Perez-Guzman, 2006 WL 3102582, 2006 WL 3102582 (5th Cir. 2006)	I		49	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Guzman-Guzman, 2006 WL 3040637 (5th Cir. 2006)	I		69	A	D	A	G	
U.S. v. Verastegui, 2006 WL 2852399 (5th Cir. 2006)	F, I	63-78	120	A	D	A	G	
U.S. v. Satti, 179 Fed.Appx. 235 (5th Cir. 2006)	F, I			A	D	A	G	
U.S. v. Sterling, 180 Fed.Appx. 515 (5th Cir. 2006)	F		120	A	D	A	G	
U.S. v. Dean, 2006 WL 3005546 (5th Cir. 2006)	D		120	A	D	A	G	
U.S. v. Delancey, 2006 WL 1996385 (5th Cir. 2006)	F		life	A	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tzep-Majia, 461 F.3d 522 (5th Cir. 2006)	I	46-57	36	B	D	A	D	
Unted States v. Johnson, 2006 WL 2277619 (5th Cir. 2006)	D	151-188	144	B	D	A	G	
U.S. v. Brasher, 2006 WL 2167703 (5th Cir. 2006)	D	57-71	48	B	D	A	G	
U.S. v. McCuiston, 183 Fed.Appx. 474 (5th Cir. 2006)	D			B	D	A	G	
U.S. v. Daniel, 178 Fed.Appx. 345 (5th Cir. 2006)	D	240 statuto ry max	120	B	D	A	G	
U.S. v. Bell, 2006 WL 572318 (5th Cir. 2006)	D		120	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez-Ibarra, 180 Fed.Appx. 513 (5th Cir. 2006)	I	41-51	36	B	D	A	G	
U.S. v. Martinez, 178 Fed.Appx. 404 (5th Cir. 2006)	D	78-98	68	B	D	A	G	
U.S. v. Roush, 466 F.3d 380 (5th Cir. 2006)	T	37-46	27	B	D	R	G	S
U.S. v. Goldsmith, 2006 WL 2034468 (5th Cir. 2006)	F	27-33	0.1	B	G	R	G	S
U.S. v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	S	60-71 plus 3 years supervised release	60 plus no supervised release	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Duhon, 440 F.3d 711 (5th Cir. 2006)	S	15-21	probation	B	G	R	G	S
U.S. v. Guidry, 462 F.3d 373 (5th Cir. 2006)	D	235-293	120	B	G	R	G	S
U.S. v. Johnson, 445 F.3d 793 (5th Cir. 2006)	F	135-168	120	stat max	D	A	G	
U.S. v. Ellis, 2006 WL 3102574 (5th Cir. 2006)	F		96	W	D	A	G	
U.S. v. Watkins, 2006 WL 3311067 (5th Cir. 2006)	D		155	W	D	A	G	
U.S. v. Petisca, 2006 WL 3230274 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. Horsting, 2006 WL 3193368 (5th Cir. 2006)	O	100-125	100	W	D	A	G	
U.S. v. Clark, 2006 WL 3102513 (5th Cir. 2006)	S		51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Smith, 2006 WL 3068667 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Washington, 2006 WL 2882703 (5th Cir. 2006)	D, F		262	W	D	A	G	
U.S. v. Wishork, WL 2711968 (5th Cir. 2006)	S		180	W	D	A	G	
U.S. v. Ibarra-Zelaya, 465 F.3d 5960 (5th Cir. 2006)	O			W	D	A	G	
U.S. v. Vanchaik-Molinar, 2006 WL 2474048 (5th Cir. 2006)	I		51	W	D	A	G	
U.S. v. Ray, 2006 WL 2482878 (5th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Clark, 2006 WL 2418953 (5th Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Underwood, 2006 WL 2460894 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Jones, 2006 WL 2350166 (5th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Larry, 2006 WL 2337543 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. El-Kareh, 2006 WL 2311112 (5th Cir. 2006)	T		48	W	D	A	G	
U.S. v. Llanas-Garcia, 2006 WL 209118 (5th Cir. 2006)	O		51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santoyo-Garcia, 2006 WL 2061833 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Robinson, 2006 WL 1983201 (5th Cir. 2006)	F		262	W	D	A	G	
U.S. v. Poore, 188 Fed.Appx. 245 (5th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Bell, 187 Fed.Appx. 418 (5th Cir. 2006)	D		240	W	D	A	G	
U.S. v. Candia, 454 F.3d 468 (5th Cir. 2006)	D	235-293	280	W	D	A	G	
U.S. v. Medina-Argueta, 454 F.3d 479 (5th Cir. 2006)	I	30-37	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ulloa, 187 Fed.Appx. 367 (5th Cir. 2006)	D		125	W	D	A	G	
U.S. v. Lopez-Garces, 186 Fed.Appx. 454 (5th Cir. 2006)	I		50	W	D	A	G	
U.S. v. Corona-Majatca, 186 Fed.Appx. 436 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Salazar, 183 Fed.Appx. 462 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Kirkham, 182 Fed.Appx. 378 (5th Cir. 2006)	T		120, 87 (two defendants)	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Luevano-Orozco, 182 Fed.Appx. 376 (5th Cir. 2006)	I		120	W	D	A	G	
U.S. v. Brown, 180 Fed.Appx. 545 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Aburto, 179 Fed.Appx. 915 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. Garcia, 173 Fed.Appx. 358 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Palacios-Mungia, 178 Fed.Appx. 347 (5th Cir. 2006)	I	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Caldwell, 448 F.3d 287 (5th Cir. 2006)	F	24-30	24	W	D	A	G	
U.S. v. Guzman-Resendez, 2006 WL 1050511 (5th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Allison, 447 F.3d 402 (5th Cir. 2006)	S		life term of supervised release	W	D	A	G	
U.S. v. Neal, 176 Fed.Appx. 542 (5th Cir. 2006)	F		115	W	D	A	G	
U.S. v. Gant, 176 Fed.Appx. 520 (5th Cir. 2006)	D			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 176 Fed.Appx. 449 (5th Cir. 2006)	D		37	W	D	A	G	
U.S. v. McDonald, 176 Fed.Appx. 43 (5th Cir. 2006)	T	37-46	37	W	D	A	G	
U.S. v. Hollins, 174 Fed.Appx. 855 (5th Cir. 2006)	S			W	D	A	G	
U.S. v. Reyes, 172 Fed.Appx. 626 (5th Cir. 2006)	D		12	W	D	A	G	
U.S. v. Meraz, 174 Fed.Appx. 196 (5th Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 172 Fed.Appx. 601 (5th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Jackson, 172 Fed.Appx. 599 (5th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Ventura, 172 Fed.Appx. 585 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Salee, 170 Fed.Appx. 891 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Prado, 169 Fed.Appx. 917 (5th Cir. 2006)	D		188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castillo, 169 Fed.Appx. 909 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Zuniga-Peralta, 442 F.3d 345 (5th Cir. 2006)	I		60	W	D	A	G	
U.S. v. Bailey, 169 Fed.Appx. 815 (5th Cir. 2006)	O		120	W	D	A	G	
U.S. v. Alonzo, 435 F.3d 551 (5th Cir. 2006)	D	24-30	30	W	D	A	G	
U.S. v. Matinez-Melchor, 161 Fed.Appx. 401 (5th Cir. 2006)	I		63	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murietta-Maldonado, 161 Fed.Appx. 374 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Vega-Soto, 2006 WL 3326920 (5th Cir. 2006)	I		96	W	D	A	G	
U.S. v. Flores-Luevano, 2006 WL 3326911 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Garcia-Hernandez, 2006 WL 3231466 (5th Cir. 2006)	I		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hernandez-Ponce, 2006 WL 3230160 (5th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Mendoza-Galvan, 2006 WL 3147473 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Gonzales, 2006 WL 3059941 (5th Cir. 2006)	S		135	W	D	A	G	
U.S. v. Jimenez, 2006 WL 2852351 (5th Cir. 2006)	F		71	W	D	A	G	
U.S. v. Coleman, 2006 WL 2689866 (5th Cir. 2006)	F			W	D	A	G	
U.S. v. McLemore, 2006 WL 2683340 (5th Cir. 2006)	T			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia-Garcia, 2006 WL 2474089 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Wood, 2006 WL 2350164 (5th Cir. 2006)	T		70	W	D	A	G	
U.S. v. Anaya-Valdez, 2006 WL 2089392 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Thomas, 2006 WL 2034641 (5th Cir. 2006)	F			W	D	A	G	
U.S. v. Rivero, 185 Fed.Appx. 378 (5th Cir. 2006)	D		292	W	D	A	G	
U.S. v. Le, 178 Fed.Appx. 386 (5th Cir. 2006)	O			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lizama-Diaz, 178 Fed.Appx. 396 (5th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Geeslin, 447 F.3d 408 (5th Cir. 2006)	T		37	W	D	A	G	
U.S. v. Ramirez-Rosas, 177 Fed.Appx. 379 (5th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Villa, 173 Fed.Appx. 335 (5th Cir. 2006)	T			'	D	A	G	
U.S. v. Rojas-Duquez, 170 Fed.Appx. 908 (5th Cir. 2006)	I	57-71	60	W	D	A	G	
U.S. v. Ekene, 2006 WL 2465402 (5th Cir. 2006)	T			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Moody, 2006 WL 2861445 (5th Cir. 2006)	T		96	W	D	A	G	
U.S. v. Rivera-Cerda, 2006 WL 2711966 (5th Cir. 2006)	O			W	D	A	G	
U.S. v. Furlow, 2006 WL 2460894 (5th Cir. 2006)	T		51	W	D	A	G	
U.S. v. Hunter, 188 Fed.Appx. 315 (5th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Camarillo-De La Cruz, 174 Fed.Appx. 244 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Hidalgo-Peralta, 166 Fed.Appx. 762 (5th Cir. 2006)	O		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Orona, 166 Fed.Appx. 765 (5th Cir. 2006)	S			W	D	A	G	
U.S. v. Green, 162 Fed.Appx. 283 (5th Cir. 2006)	O		18	W	D	A	G	
U.S. v. Rivere, 178 Fed.Appx. 445 (5th Cir. 2006)	T		150	W	D	A	G	

SIXTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Anderson, 187 Fed.Appx. 517 (6th Cir. 2006)	O	12 - 18	36	A	Both	A	G	
U.S. v. Reid, 2006 WL 3314556 (6th Cir. 2006)	O	8-14	24	A	D	A	G	
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	77-96	132	A	D	A	G	
U.S. v. Lossia, 2006 WL 2431003 (6th Cir. 2006)	T	63 - 78	98	A	D	A	G	
U.S. v. Ferguson, 456 F.3d 660 (6th Cir. 2006)	O	0-6	12	A	D	A	G	
U.S. v. Barton, 455 F.3d 649 (6th Cir. 2006)	T	100 - 125	168	A	D	A	G	
U.S. v. Soto, 2006 WL 2045488 (6th Cir. 2006)	O	8 -14	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hopson, 2006 WL 1913414 (6th Cir. 2006)	F	63-78	84	A	D	A	G	
U.S. v. Mathney, 450 F.3d 633 (6th Cir. 2006)	F, D	24 - 30	36	A	D	A	G	
U.S. v. Brown, 163 Fed.Appx. 370 (6th Cir. 2006)	O	12 - 18	24	A	D	A	G	
U.S. v. Slodoba, 162 Fed.Appx. 550 (6th Cir. 2006)	O	3 - 9	12	A	D	A	G	
Johnson v. U.S., 179 Fed.Appx. 246 (6th Cir. 2006)	O	5 - 11	48	A	D	A	G	
U.S. v. Carr, 421 F.3d 425 (6th Cir. 2006)	O	? - 9	16	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mackie, 173 Fed.Appx. 427 (6th Cir. 2006)	O	5 - 11	24	A	D	A	G	
U.S. v. Mendoza, 2006 WL 2787017 (6th Cir. 2006)	D	135 - 168	200	A	D	A	G	
U.S. v. Ray, 2006 WL 2042651 (6th Cir. 2006)	S	235 - 290, 300 month statuto ry mandat ory min	600	A	D	R	D	P
U.S. v. Yopp, 453 F.3d 770 (6th Cir. 2006)	O	3-9	24	A	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jackson, 2006 WL 3059886 (6th Cir. 2006)	F	84 - 105	72	B	D	A	G	
U.S. v. Deveaux, 2006 WL 2827672 (6th Cir. 2006)	D	210 - 262	180	B	D	A	G	
U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006)	O	97 - 121	80	B	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D		168	B	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D	151 - 188	70	B	D	A	G	
U.S. v. Gomez, 2006 WL 2168011 (6th Cir. 2006)	D, O	life	420	B	D	A	G	
U.S. v. Ybarra-Moreno, 2006 WL 2042918 (6th Cir. 2006)	I	57 - 71	54	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Carroll, 2006 WL 2042652 (6th Cir. 2006)	O	57 - 71	51	B	D	A	G	
U.S. v. Eason, 188 Fed.Appx. 383 (6th Cir. 2006)	D, O	life	480	B	D	A	G	
U.S. v. Redmond, 188 Fed.Appx. 377 (6th Cir. 2006)	T	33 - 41	30	B	D	A	G	
U.S. v. Currie, 183 Fed.Appx. 536 (6th Cir. 2006)	F	130 - 162	120	B	D	A	G	
U.S. v. Willis, 176 Fed.Appx. 653 (6th Cir. 2006)	D	262 - 327	240	B	D	A	G	
U.S. v. Savoca, 166 Fed.Appx. 183 (6th Cir. 2006)	T, F	927 - ?	840	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Satterfield, 2006 WL 2986449 (6th Cir. 2006)	D	87 - 108	36	B	D	A	G	
U.S. v. Ossa-Gallagos, 453 F.3d 371 (6th Cir. 2006)	I	41 - 51	33	B	D	A	G	
U.S. v. Collington, 461 F.3d 805 (6th Cir. 2006)	D	188 - 235	120	B	G	A	D	
U.S. v. Davis, 458 F.3d 491 (6th Cir. 2006)	T	30 - 37	1 day	B	G	R	G	S
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	life	life	mandat min.	D	A	G	
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	20 years (mand min)	240	mandat min.	D	A	G	
U.S. v. Caswell, 456 F.3d 652 (6th Cir. 2006)	F	46-57	51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 171 Fed.Appx. 499 (6th Cir. 2006)	F		86	W	D	A	G	
U.S. v Ely, 2006 WL 3313949 (6th Cir. 2006)	O	10 - 16	10	W	D	A	G	
U.S. v. Bernal-Aveja, 2006 WL 3314539 (6th Cir. 2006)	I	57 - 71	57	W	D	A	G	
U.S. v. Boyd, 2006 WL 3307476 (6th Cir. 2006)	F	100 - 120	120	W	D	A	G	
U.S. v. Waterford, 2006 WL 3279855 (6th Cir. 2006)	D	300 - 312	300	W	D	A	G	
U.S. v. McCaskill, 2006 WL 3026226 (6th Cir. 2006)	T	188 - 235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nickson, 2006 WL 2930105 (6th Cir. 2006)	T	46 - 57	57	W	D	A	G	
U.S. v. Washington, 2006 WL 2873368 (6th Cir. 2006)	G, F	21-27	21	W	D	A	G	
U.S. v. Foreman, 2006 WL 2873176 (6th Cir. 2006)	F	57 - 71	57	W	D	A	G	
U.S. v. Jones, 2006 WL 2769314 (6th Cir. 2006)	D	151 - 188	156	W	D	A	G	
U.S. v. Bowen, 2006 WL 2571992 (6th Cir. 2006)	D	360 - life	360	W	D	A	G	
U.S. v. Bergold, 2006 WL 2571999 (6th Cir. 2006)	D	84 - 105	84	W	D	A	G	
U.S. v. Dixon, 2006 WL 2572064 (6th Cir. 2006)	D	21 - 27	21	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Villa-Gomez, 2006 WL 2497885 (6th Cir. 2006)	T	151 - 188	152	W	D	A	G	
U.S. v. Cruz, 461 F.3d 752 (6th Cir. 2006)	O	97 - 121	108	W	D	A	G	
U.S. v. Whitemore, 2006 WL 2472855 (6th Cir. 2006)	F	92 - 115	94	W	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D	121 - 151	121	W	D	A	G	
U.S. v. Morris, 2006 WL 2456964 (6th Cir. 2006)	T	46 - 57	46	W	D	A	G	
U.S. v. Underwood, 2006 WL 2381611 (6th Cir. 2006)	F, D		100	W	D	A	G	
U.S. v. Benson, 2006 WL 2380882 (6th Cir. 2006)	F, D	360 - life	360	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Harden, 2006 WL 2373259 (6th Cir. 2006)	F	188 - 235	188	W	D	A	G	
U.S. v. Cage, 458 F.3d 537 (6th Cir. 2006)	T	37 - 46	37	W	D	A	G	
U.S. v. Davis, 458 F.3d 505 (6th Cir. 2006)	O	37 - 46	37	W	D	A	G	
U.S. v. Jenkins, 2006 WL 2329372 (6th Cir. 2006)	F	100 - 125	100	W	D	A	G	
U.S. v. Sake, 2006 WL 2188707 (6th Cir. 2006)	D	97 - 121	120	W	D	A	G	
U.S. v. Wynn, 2006 WL 2168207 (6th Cir. 2006)	F	100 - 125	100	W	D	A	G	
U.S. v. Perez-Garcia, 2006 WL 2168196 (6th Cir. 2006)	I	77 - 96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Walker, 188 Fed.Appx. 433 (6th Cir. 2006)	T	188 - 235	208	W	D	A	G	
U.S. v. Henley, 2006 WL 2168216 (6th Cir. 2006)	D, O	46 - 57	52	W	D	A	G	
U.S. v. Melton, 188 Fed.Appx. 428 (6th Cir. 2006)	D	97 - 121	120	W	D	A	G	
U.S. v. Garcia-Perez, 2006 WL 2075253 (6th Cir. 2006)	I	? - 96	96	W	D	A	G	
U.S. v. Shoup, 188 Fed.Appx. 418 (6th Cir. 2006)	O	51 - 60	51	W	D	A	G	
U.S. v. Lynch, 188 Fed.Appx. 416 (6th Cir. 2006)	D		150	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Caraway, 2006 WL 2042895 (6th Cir. 2006)	F	262 - 327	302	W	D	A	G	
U.S. v. Greer, 2006 WL 2042653 (6th Cir. 2006)	O	12 - 18	12	W	D	A	G	
U.S. v. Harness, 453 F.3d 752 (6th Cir. 2006)	F	37 - 46	44	W	D	A	G	
U.S. v. Skibo, 188 Fed.Appx. 373 (6th Cir. 2006)	T	151 - 188	154	W	D	A	G	
U.S. v. Worley, 453 F.3d 706 (6th Cir. 2006)	D		152	W	D	A	G	
U.S. v. Mickens, 453 F.3d 668 (6th Cir. 2006)	T	30 - 37	30	W	D	A	G	
U.S. v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006)	I	30 - 37	30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Zerilli, 187 Fed.Appx. 529 (6th Cir. 2006)	O	63 - 78	71	W	D	A	G	
U.S. v. Benson, 186 Fed.Appx. 648 (6th Cir. 2006)	T	360 - life	540	W	D	A	G	
U.S. v. Leppen, 187 Fed.Appx. 504 (6th Cir. 2006)	D	140 - ?	140	W	D	A	G	
U.S. v. Overton, 186 Fed.Appx. 607 (6th Cir. 2006)	D	210 - 262	210	W	D	A	G	
U.S. v. Sanford, 186 Fed.Appx. 614 (6th Cir. 2006)	F	92 - 115	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Haworth, 187 Fed.Appx. 458 (6th Cir. 2006)	S	41 - 51	41	W	D	A	G	
U.S. v. Louis, 185 Fed.Appx. 500 (6th Cir. 2006)	I	70 - 87	78	W	D	A	G	
U.S. v. Lumley, 185 Fed.Appx. 495 (6th Cir. 2006)	D		90	W	D	A	G	
U.S. v. Delaney, 185 Fed.Appx. 492 (6th Cir. 2006)	F	235 - 293	240	W	D	A	G	
U.S. v. Jackson, 186 Fed.Appx. 579 (6th Cir. 2006)	D	27 - 33	33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bustos, 186 Fed.Appx. 551 (6th Cir. 2006)	D, F	97-121	120	W	D	A	G	
U.S. v. Buchannan, 449 F.3d 731 (6th Cir. 2006)	F	77 - 96	77	W	D	A	G	
U.S. v. McWhirter, 184 Fed.Appx. 467 (6th Cir. 2006)	F		57	W	D	A	G	
U.S. v. Porter, 181 Fed.Appx. 545 (6th Cir. 2006)	D	235 - 293	235	W	D	A	G	
U.S. v. Speight, 183 Fed.Appx. 532 (6th Cir. 2006)	F	188 - 235	175	W	D	A	G	
U.S. v. Cheney, 183 Fed.Appx. 516 (6th Cir. 2006)	F	37 - 46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morris, 448 F.3d 929 (6th Cir. 2006)	O	57 - 71, capped at 60	57	W	D	A	G	
U.S. v. Carrillo-Hernandez, 181 Fed.Appx. 522 (6th Cir. 2006)	I	27 - 33	27	W	D	A	G	
U.S. v. Crenshaw, 182 Fed.Appx. 440 (6th Cir. 2006)	F	92 - 115	115	W	D	A	G	
U.S. v. Ward, 447 F.3d 869 (6th Cir. 2006)	T, F	188 - 235	220	W	D	A	G	
U.S. v. Coffee, 180 Fed.Appx. 562 (6th Cir. 2006)	T		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz, 179 Fed.Appx. 938 (6th Cir. 2006)	D	60 - 63	61	W	D	A	G	
U.S. v. Pickett, 179 Fed.Appx. 315 (6th Cir. 2006)	F			W	D	A	G	
U.S. v. Hill, 179 Fed.Appx. 280 (6th Cir. 2006)	F	46 - 57	46	W	D	A	G	
U.S. v. Jackson, 179 Fed.Appx. 283 (6th Cir. 2006)	F	92 - 115	108	W	D	A	G	
U.S. v. Jones, 445 F.3d 865 (6th Cir. 2006)	T	6 - 12	12	W	D	A	G	
U.S. v. Brown, 444 F.3d 519 (6th Cir. 2006)	F	262 - 327	280	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nguyen, 176 Fed.Appx. 634 (6th Cir. 2006)	D	51 - 63	60	W	D	A	G	
U.S. v. Bolanos, 174 Fed.Appx. 320 (6th Cir. 2006)	D	70 - 87	84	W	D	A	G	
U.S. v. Cowan, 174 Fed.Appx. 307 (6th Cir. 2006)	T	46 - 57	50	W	D	A	G	
U.S. v. Mullins, 173 Fed.Appx. 400 (6th Cir. 2006)	O	4 - 10	8	W	D	A	G	
U.S. v. Hope, 167 Fed.Appx. 531 (6th Cir. 2006)	T	51-63	54	W	D	A	G	
U.S. v. Katzopoulus, 437 F.3d 569 (6th Cir. 2006)	T	33 - 41	33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ediger, 166 Fed.Appx. 218 (6th Cir. 2006)	T	33 - 41	36	W	D	A	G	
U.S. v. Richardson, 437 F.3d 550 (6th Cir. 2006)	T	151 - 188	180	W	D	A	G	
U.S. v. Alford, 436 F.3d 677 (6th Cir. 2006)	F	110 - 120	120	W	D	A	G	
U.S. v. Cortez, 166 Fed.Appx. 196 (6th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Williams, 436 F.3d 706 (6th Cir. 2006)	F	57 - 71	64	W	D	A	G	
U.S. v. Spates, 162 Fed.Appx. 592 (6th Cir. 2006)	T	27 - 33	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Till, 434 F.3d 880 (6th Cir. 2006)	F	151 - 188, stat. max of 120	120	W	D	A	G	
U.S. v. McBride, 434 F.3d 470 (6th Cir. 2006)	T	77 - 96	78	W	D	A	G	
U.S.v. Seymour, 2006 WL 3300002 (6th Cir. 2006)	S		262	W	D	A	G	
U.S. v. Moore, 180 Fed.Appx. 571 (6th Cir. 2006)	T	151 - 188	180	W	D	A	G	
U.S. v. Ibarra, 179 Fed.Appx. 317 (6th Cir. 2006)	I	46 - 57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Giles, 170 Fed.Appx. 414 (6th Cir. 2006)	F	77 - 96	84	W	D	A	G	
U.S. v. Johnson, 184 Fed.Appx. 498 (6th Cir. 2006)	D	135 - 168	144	W	D	A	G	
U.S. v. Johson, 2006 WL 3069075 (6th Cir. 2006)	F	30 - 37	30	W	D	R	D	P
U.S. v. Blackwell, 459 F.3d 739 (6th Cir. 2006)	O		72	W	D	A	G	

SEVENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bullion, 466 F.3d 574 (7th Cir. 2006)	F	188-235	264	A	D	A	G	
U.S. v. Zimmer, 2006 WL 2864622 (7th Cir. 2006)	T	24-30	48	A	D	A	G	
U.S. v. Leahy, 464 F.3d 773 (7th Cir. 2006)	T	78-97	118	A	D	A	G	
U.S. v. Valle, 458 F.3d 652 (7th Cir. 2006)	T	100-125	139	A	D	A	G	
U.S. v. Howard, 454 F.3d 700 (7th Cir. 2006)	D	188-235	293	A	D	A	G	
U.S. v. Tautan, 185 Fed.Appx. 524 (7th Cir. 2006)	T	24-30	40	A	D	A	G	
U.S. v. Walker, 447 F.3d 999 (7th Cir. 2006)	O	168-210	240	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jones, 156 Fed. Appx. 852 (7th Cir. 2005)	O	8-14	18	A	D	A	G	
U.S. v. Filipiak, 466 F.3d 582 (7th Cir. 2006)	T	33-41	24	B	D	A	G	
U.S. v. Stevens, 2006 WL 2787777 (7th Cir. 2006)	D		145	B	D	A	G	
U.S. v. Watkins, 2006 WL 2787719 (7th Cir. 2006)	D	188-235	167	B	D	A	G	
U.S. v. Ibarra, 2006 WL 2016297 (7th Cir. 2006)	I	77-96	60	B	D	A	G	
U.S. v. Poole, 173 Fed.Appx. 488 (7th Cir. 2006)	T	108-135	60	B	D	A	G	
U.S. v. Hewlett, 453 F.3d 876 (7th Cir. 2006)	D	Life	240	B	G	A	D	
U.S. v. Baker, 445 F.3d 987 (7th Cir. 2006)	O, S	108-135	87	B	G	A	D	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wallace, 458 F.3d 606 (7th Cir. 2006)	T	24-30	Probatio n	B	G	R	G	P
U.S. v. Jointer, 457 F.3d 682 (7th Cir. 2006)	D	135-168	87	B	G	R	G	S
U.S. v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006)	I	41-51	27	B	G	R	G	S
U.S. v. Repking, 2006 WL 3201034 (7th Cir. 2006)	T	41-51	1 day	B	G	R	G	S
U.S. v. Triliegi, 2006 WL 3147242 (7th Cir. 2006)	D	30-37	120	Mand. Min.	D	A	G	
U.S. v. Collins, 170 Fed. Appx 421 (7th Cir. 2006)	T	121-151	120	stat max	D	A	G	
U.S. v. Wurzinger, 2006 WL 3055954 (7th Cir. 2006)	D	210-262	262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Roberson, 2006 WL 3077144 (7th Cir. 2006)	D	168-210; 188-235; 210-262	180; 194; 210	W	D	A	G	
U.S. v. Roche-Martinez, 2006 WL 2972698 (7th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Lopez-Estrada, 2006 WL 3000746 (7th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Jordan, 2006 WL 2927424 (7th Cir. 2006)	D		180	W	D	A	G	
U.S. v. Perez, 2006 WL 2683440 (7th Cir. 2006)	D	360-Life	360	W	D	A	G	
U.S. v. Gonzalez, 462 F.3d 754 (7th Cir. 2006)	D	262-327	276	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 463 F.3d 598 (7th Cir. 2006)	O	37-46	37	W	D	A	G	
U.S. v. Flowers, 2006 WL 2528479 (7th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Rinaldi, 461 F.3d 922 (7th Cir. 2006)	T	15-21	21	W	D	A	G	
U.S. v. Steele, 2006 WL 2422830 (7th Cir. 2006)	T	92-115	96	W	D	A	G	
U.S. v. Cooper, 461 F.3d 850 (7th Cir. 2006)	D		240	W	D	A	G	
U.S. v. Santamaria-Vasquez, 2006 WL 2433894 (7th Cir. 2006)	I		40	W	D	A	G	
U.S. v. Turner, 2006 WL 2457383 (7th Cir. 2006)	F	292-365	292	W	D	A	G	
U.S. v. Brazinskas, 458 F.3d 666 (7th Cir. 2006)	T	110-137	120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza, 457 F.3d 726 (7th Cir. 2006)	T		108	W	D	A	G	
U.S. v. Bay, 2006 WL 2233215 (7th Cir. 2006)	T		32	W	D	A	G	
U.S. v. Rush, 2006 WL 2266985 (7th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Ramsey, 186 Fed.Appx. 686 (7th Cir. 2006)	F	18-24	21	W	D	A	G	
U.S. v. Garner, 454 F.3d 743 (7th Cir. 2006)	F	100-125	120	W	D	A	G	
U.S. v. Cardona, 2006 WL 2076422 (7th Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. McLee, 2006 WL 2089199 (7th Cir. 2006)	T	262-327 + 60 mand. consec.	262 + 60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murph-Jackson, 187 Fed.Appx. 653 (7th Cir. 2006)	T		262	W	D	A	G	
U.S. v. Gurinas, 187 Fed.Appx. 647 (7th Cir. 2006)	T	15-21	15	W	D	A	G	
U.S. v. Gordon, 2006 WL 2045718 (7th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Tyra, 454 F.3d 686 (7th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Rosby, 454 F.3d 670 (7th Cir. 2006)	T, O		87	W	D	A	G	
U.S. v. Jones, 454 F.3d 642 (7th Cir. 2006)	D		300	W	D	A	G	
U.S. v. Santos, 2006 WL 2033698 (7th Cir. 2006)	D	120-135	120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Blue, 453 F.3d 948 (7th Cir. 2006)	F	46-57	46	W	D	A	G	
U.S. v. Grigg, 186 Fed.Appx. 679 (7th Cir. 2006)	S	37-46	37	W	D	A	G	
U.S. v. Graves, 184 Fed.Appx. 579 (7th Cir. 2006)	D	360-Life	360	W	D	A	G	
U.S. v. Gutierrez-Ruiz, 184 Fed.Appx. 564 (7th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Miller, 450 F.3d 270 (7th Cir. 2006)	D	262-327	300	W	D	A	G	
U.S. v. Ramirez-Ibarra, 182 Fed.Appx. 591 (7th Cir. 2006)	I		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McKee, 182 Fed.Appx. 593 (7th Cir. 2006)	D		112	W	D	A	G	
U.S. v. Hale, 448 F.3d 971 (7th Cir. 2006)	O		480	W	D	A	G	
U.S. v. Payan, 182 Fed.Appx. 560 (7th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Lenover, 182 Fed.Appx. 563 (7th Cir. 2006)	D	Life	Life	W	D	A	G	
U.S. v. Farris, 448 F.3d 965 (7th Cir. 2006)	O		120	W	D	A	G	
U.S. v. Spano, 447 F.3d 517 (7th Cir. 2006)	T		78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thurman, 179 Fed.Appx. 971 (7th Cir. 2006)	D		96	W	D	A	G	
U.S. v. Trombetta, 177 Fed.Appx. 492 (7th Cir. 2006)	D		110	W	D	A	G	
U.S. v. Martinez, 173 Fed.Appx. 529 (7th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Mitchell, 176 Fed.Appx. 676 (7th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Leal, 175 Fed.Appx. 763 (7th Cir. 2006)	D	37-46	38	W	D	A	G	
U.S. v. Moore, 2006 WL 906435 (7th Cir. 2006)	T	41-51 33-41	41 33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Coleman, 175 Fed.Appx. 756 (7th Cir. 2006)	D	78-97	92	W	D	A	G	
U.S. v. Davis, 442 F.3d 1003 (7th Cir. 2006)	T		41	W	D	A	G	
U.S. v. Barnes, 173 Fed.Appx. 522 (7th Cir. 2006)	T		87	W	D	A	G	
U.S. v. Reyes-Acosta, 173 Fed.Appx. 494 (7th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006)	I	41-51	41	W	D	A	G	
United States v. Owens, 441 F.3d 486 (7th Cir. 2006)	T	57-71	60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Andrlik, 173 Fed.Appx. 455 (7th Cir. 2006)	D	46-57	57	W	D	A	G	
U.S. v. Ellis, 440 F.3d 434 (7th Cir. 2006)	O	18-24	18	W	D	A	G	
U.S. v. Heintzelman, 170 Fed.Appx. 427 (7th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Sandoval-Vasquez, 435 F.3d 739 (7th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Cervantes-Lopez, 165 Fed. Appx. 485 (7th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Romero-Pedroza, 167 Fed. Appx. 576 (7th Cir. 2006)	I	57-71	64	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Brisson, 448 F.3d 989 (7th Cir. 2006)	T		30	W	D	A	G	
U.S. v. Marty, 450 F.3d 687 (7th Cir. 2006)	D	63-78	78	W	D	A	G	
U.S. v. Beatty, 189 Fed. Appx. (7th Cir. 2006)	F		62	W	D	A	G	
U.S. v. Tejeda-Lorenzo, 189 Fed. Appx. (7th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Juarez, 454 F.3d 717 (7th Cir. 2006)	F	235-293	240	W	D	A	G	
U.S. v. Brooks, 188 Fed. Appx. 520 (7th Cir. 2006)	O	151-188	155	W	D	A	G	
U.S. v. Murillo-Guerrero, 2006 WL 2547399 (7th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 2006 WL 2548413 (7th Cir. 2006)	D	151-181	151	W	D	A	G	
U.S. v. Thornton, 463 F.3d 693 (7th Cir. 2006)	F			W	D	A	G	
U.S. v. Loizzi, 2006 WL 2864624 (7th Cir. 2006)	D	188-235	211	W	D	A	G	
U.S. v. Fortner, 2006 WL 3016922 (7th Cir. 2006)	D	262-327	288	W	D	A	G	
U.S. v. Cortez-Mendez, 162 Fed. Appx.610 (7th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Rutherford, 158 Fed. Appx. 742 (7th Cir. 2006)	I		24	W	D	A	G	
U.S. v. Contreras, 159 Fed. Appx. 733 (7th Cir. 2006)	D	235-193	235	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hanson, 160 Fed. Appx 474 (7th Cir. 2006)	D	168-210	180	W	D	A	G	
U.S. v. Amuda, 160 Fed. Appx. 476 (7th Cir. 2006)	F		130	W	D	A	G	
U.S. v. Henry, 153 Fed. Appx. 977 (7th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Barajas-Hernandez, 140 Fed. Appx. 626 (7th Cir. 2006)	I		18	W	D	A	G	
U.S. v. Melendez, 2006 WL 3040749 (7th Cir. 2006)	D	292-365	300	W	D	A	G	
U.S. v. Laufle, 433 F.3d 981 (7th Cir. 2006)	D	70-87	76	W	D	A	G	
U.S. v. Johnson, 161 Fed. Appx. 600 (7th Cir. 2006)	T	63-78	78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vaughn, 433 F.3d 917 (7th Cir. 2006)	T		112	W	D	A	G	
U.S. v. Cordero-Guzman, 2006 WL 3314514 (7th Cir. 2006)	I		18	W	D	A	G	
U.S. v. Smith, 2006 WL 2457462 (7th Cir. 2006)	F	12-18	12	W	D	R	D	P
U.S. v. Hankton, 463 F.3d 626 (7th Cir. 2006)	D D		300 210	W W	D D	A A	G G	

EIGHTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lyons, 450 F.3d 834 (8th Cir. 2006)	T	70-87	180	A	D	A	G	
U.S. v. Tensley, Jr., 2006 WL 2661154 (8th Cir. 2006)	F	63-78	84	A	D	A	G	
U.S. v. Mallory, 2006 WL 2441577 (8th Cir. 2006)	D	27-33	60	A	D	A	G	
U.S. v. Maurstad, 454 F.3d 787 (8th Cir. 2006)	D	41-51	120	A	D	A	G	
U.S. v. Meyer, 452 F.3d 998 (8th Cir. 2006)	S		270	A	D	A	G	
U.S. v. Bird, 450 F.3d 789 (8th Cir. 2006)	O	46-57	67	A	D	A	G	
U.S. v. Anderson, 440 F.3d 1013 (8th Cir. 2006)	T	87-108	120	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Porter, 439 F.3d 845 (8th Cir. 2006)	F	57-71	120	A	D	A	G	
U.S. v. Hawkman, 438 F.3d 879 (8th Cir. 2006)	F	161-171	228	A	D	A	G	
U.S. v. Ademi, 439 F.3d 964 (8th Cir. 2006)	I	37-46	47	A	D	A	G	
U.S v. Kelly, 436 F.3d 992 (8th Cir. 2006)	F	70-87	96	A	D	A	G	
U.S. v. Sitting Bear, 436 F.3d 929 (8th Cir. 2006)	O	151-188	228	A	D	A	G	
U.S. v. Marshall, 436 F.3d 929 (8th Cir. 2006)	O	151-188	228	A	D	A	G	
U.S. v. Larrabee, 436 F.3d 890 (8th Cir. 2006)	O	188-235	363	A	D	A	G	
U.S. v. Nelson, 453 F.3d 1004 (8th Cir. 2006)	D	4-10	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Chase, 451 F.3d 474 (8th Cir. 2006)	O	57-71	96	A	D	A	G	
U.S. v. Mack, 452 F.3d 744 (8th Cir. 2006)	S	30-37	51	A	D	A	G	
U.S. v. Hacker, 450 F.3d 808 (8th Cir. 2006)	T	92-115	180	A	D	A	G	
U.S. v. Porchia, 180 Fed.Appx. 596 (8th Cir. 2006)	D	6-12	24	A	D	A	G	
U.S. v. Larison, 432 F.3d 921 (8th Cir. 2006)	D	5-11	60	A	D	A	G	
U.S. v. Hawk Wing, 433 F.3d 622 (8th Cir. 2006)	T	6-12	18	A	D	A	G	
U.S. v. Kendall, 446 F.3d 782 (8th Cir. 2006)	D	27-33	84	A	D	R	D	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. D.A.L.D., 2006 WL 3230091 (8th Cir. 2006)	O	46-57	24	B	D	A	G	
U.S. v. Davis, 2006 WL 3161928 (8th Cir. 2006)	D	235-293	180	B	D	A	G	
U.S. v. Whipple, 2006 WL 2714924 (8th Cir. 2006)		292-365	240	B	D	A	G	
U.S. v. Pamperin, 456 F.3d 822 (8th Cir. 2006)	D	210-240	120	B	D	A	G	
U.S. v. Dieatrick, 2006 WL 1913440 (8th Cir. 2006)	S	120-?	72	B	D	A	G	
U.S. v. Longoria, 186 Fed.Appx. 699 (8th Cir. 2006)	T	70-87	48	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bassinger, 183 Fed.Appx. 588 (8th Cir. 2006)	D	?-240	216	B	D	A	G	
U.S. v. Pierce, 179 Fed.Appx. 975 (8th Cir. 2006)	F	27-33	21	B	D	A	G	
U.S. v. Alexander, 170 Fed.Appx. 992 (8th Cir. 2006)	D		12	B	D	A	G	
U.S. v. Berni, 439 F.3d 990 (8th Cir. 2006)	D	188-235	96	B	D	A	G	
U.S. v. Morin, 437 F.3d 777 (8th Cir. 2006)	D	324-405	264	B	D	A	G	
U.S. v. Olthoff, 437 F.3d 729 (8th Cir. 2006)	F	110-120	92	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Puckett, 163 Fed.Appx. 430 (8th Cir. 2006)	O		6	B	D	A	G	
U.S. v. Worthing, 434 F.3d 1046 (8th Cir. 2006)	T	151-188	120	B	D	A	G	
U.S. v. Gaver, 452 F.3d 1007 (8th Cir. 2006)	F	37-46	29	B	D	A	G	
U.S. v. Scott, 448 F.3d 1040 (8th Cir. 2006)	T	63-78	55	B	D	A	G	
U.S. v. Blanchard, 162 Fed.Appx. 655 (8th Cir. 2006)	D, F	324-405	228	B	D	A	G	
U.S. v. Krutsinger, 449 F.3d 827 (8th Cir. 2006)	O	70-87	24	B	G	A	D	
U.S. v. Maloney, 466 F.3d 663 (8th Cir. 2006)	F	360-life	180	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Beal, 463 F.3d 834 (8th Cir. 2006)	D	188-235	84	B	G	R	G	S
U.S. v. McDonald, 461 F.3d 948 (8th Cir. 2006)	D	262-327	132	B	G	R	G	S
U.S. v. Portillo, 458 F.3d 828 (8th Cir. 2006)	D	188-235	120	B	G	R	G	S
U.S. v. Robinson, 454 F.3d 839 (8th Cir. 2006)	F	63-78	Pro-bation	B	G	R	G	S
U.S. v. Brown, 453 F.3d 1024 (8th Cir. 2006)	D	360-life	240	B	G	R	G	S
U.S. v. Smith, 450 F.3d 856 (8th Cir. 2006)	D	262-327	204	B	G	R	G	P
U.S. v. Medearis, 451 f.3D 918 (8th Cir. 2006)	F, D	46-57	Pro-bation	B	G	R	G	S
U.S. v. Ture, 450 F.3d 352 (8th Cir. 2006)	O	12-18	Pro-bation+ service	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rogers, 448 F.3d 1033 (8th Cir. 2006)	F	51-63	12	B	G	R	G	S/P
U.S. v. Gall, 446 F.3d 884 (8th Cir. 2006)	D	30-37	probation	B	G	R	G	S
U.S. v. Bueno, 443 F.3d 1017 (8th Cir. 2006)	D	108-135	18	B	G	R	G	S
U.S. v. Lazenby, 439 F.3d 928 (8th Cir. 2006)	D	70-87	12	B	G	R	G	S
U.S. v. Rivera, 439 F.3d 446 (8th Cir. 2006)	D	188-235	60	B	G	R	G	P
U.S. v. Myers, 439 F.3d 415 (8th Cir. 2006)	F	37-46	12	B	G	R	G	P
U.S. v. Claiborne, 439 F.3d 479 (8th Cir. 2006)	D	37-46	15	B	G	R	G	S
U.S. v. Gatewood, 438 F.3d 894 (8th Cir. 2006)	F	63-78	36	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Shafer, 438 F.3d 1225 (8th Cir. 2006)	S	63-78	48	B	G	R	G	S
U.S. v. McMannus, 436 F.3d 871 8th Cir. 2006)	D	57-71	24	B	G	R	G	S
U.S. v. Brinton, 436 F.3d 871 (8th Cir. 2006)	D	262-327	120	B	G	R	G	S
U.S. v. Feemster, 435 F.3d 881 (8th Cir. 2006)	D	360-life	120	B	G	R	G	P
U.S. v. Collier, 2006 WL 2290513 (8th Cir. 2006)	D	188-235	72	B	G	R	G	P
U.S. v. Lee, 454 F.3d 836 (8th Cir. 2006)	D	262-327	120	B	G	R	G	S
U.S. v. Bradford, 447 F.3d 1026 (8th Cir. 2006)	F, D	110-137	36	B	G	R	G	S
U.S. v. Bryant, 446 F.3d 1317 (8th Cir. 2006)	D	70-87	30	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Givens, 443 F.3d 642 (8th Cir. 2006)	T	24-30	0	B	G	R	G	S
U.S. v. Goody, 442 F.3d 1132 (8th Cir. 2006)	D	168-210	72	B	G	R	G	S
U.S. v. Mentzos, II, 462 F.3d 830 (8th Cir. 2006)	S		480	W	D	A	G	
U.S. v. Perry, 2006 WL 3230094 (8th Cir. 2006)	T		21	W	D	A	G	
U.S. v. Larkins, 2006 WL 3208671 (8th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Muhammad, 2006 WL 3161928 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Francis, 2006 WL 3161928 (8th Cir. 2006)	D	360-life	420	W	D	A	G	
U.S. v. Francis, 2006 WL 3161928 (8th Cir. 2006)	D	life	life	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ellison, 2006 WL 314733 (8th Cir. 2006)	T		33	W	D	A	G	
U.S. v. Martinez, 2006 WL 3078924 (8th Cir. 2006)	I		84	W	D	A	G	
U.S. v. Perez, 2006 WL 2993390 (8th Cir. 2006)	D		100	W	D	A	G	
U.S. v. Crow, 2006 WL 2987304 (8th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Garcia-Sanchez, 2006 WL 2946826 (8th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Ware, 2006 WL 2873245 (8th Cir. 2006)	F	46-57	57	W	D	A	G	
U.S. v. McCorkle, 2006 WL 2742323 (8th Cir. 2006)	F	57-71	64	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mosner, 2006 WL 2661156 (8th Cir. 2006)	T		188	W	D	A	G	
U.S. v. Stewart, 462 F.3d 960 (8th Cir. 2006)	O	292-360	300	W	D	A	G	
U.S. v. Huber, 462 F.3d 945 (8th Cir. 2006)	T		60	W	D	A	G	
U.S. v. Straughan, 462 F.3d 847 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Moore, 2006 WL 2561243	T		12	W	D	A	G	
U.S. v. Kiertzner, 460 F.3d 988 (8th Cir. 2006)	F		41	W	D	A	G	
U.S. v. Plumman, 188 Fed.Appx. 529 (8th Cir. 2006)	S	?-life	384	W	D	A	G	
U.S. v. Winston, 456 F.3d 861 (8th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Foote, 454 F.3d 787 (8th Cir. 2006)	D	210-262	240	W	D	A	G	
U.S. v. Oslund, 453 F.3d 1048 (8th Cir. 2006)	F, T	?-life	life	W	D	A	G	
U.S. v. Adams, 451 F.3d 471 (8th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Gregg, 451 F.3d 930 (8th Cir. 2006)	O	135-168	135	W	D	A	G	
U.S. v. Mathis, 451 F.3d 939 (8th Cir. 2006)	S		214	W	D	A	G	
U.S. v. Lee, 451 F.3d 914 (8th Cir. 2006)	D, F	346-411	346	W	D	A	G	
U.S. v. Dunlap, 452 F.3d 747 (8th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Gladney, 184 Fed.Appx. 586 (8th Cir. 2006)	D	188-235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Walker, 2006 WL 1596805 (8th Cir. 2006)	T		87	W	D	A	G	
U.S. v. Snider, 2006 WL 1594429 (8th Cir. 2006)	D		196	W	D	A	G	
U.S. v. Nuno-Alvarez, 182 Fed.Appx. 630 (8th Cir. 2006)	D		87	W	D	A	G	
U.S. v. Espinoza-Naranjo, 182 Fed.Appx. 610 (8th Cir. 2006)	I, D	77-96	42 + time served	W	D	A	G	
U.S. v. Erby, 180 Fed.Appx. 637 (8th Cir. 2006)	F		40	W	D	A	G	
U.S. v. Cazares-Gonzales, 182 Fed.Appx 603 (8th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Aguilar-Martinez, 181 Fed.Appx. 612 (8th Cir. 2006)	D		322	W	D	A	G	
U.S. v. Williams, 180 Fed.Appx. 615 (8th Cir. 2006)	F		41	W	D	A	G	
U.S. v. Willis, 180 Fed.Appx. 605 (8th Cir. 2006)	T		180	W	D	A	G	
U.S. v. Anderson, 446 F.3d 870 (8th Cir. 2006)	O	15-21	21	W	D	A	G	
U.S. v. Jeremiah, 446 F.3d 805 (8th Cir. 2006)	S		27	W	D	A	G	
U.S. v. Dion, 178 Fed.Appx. 609 (8th Cir. 2006)	T		36	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Darks, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Ruiz, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Turner, 178 Fed.Appx. 600 (8th Cir. 2006)	D	57-71	71	W	D	A	G	
U.S. v. Bell, 445 F.3d 1086 (8th Cir. 2006)	T		100	W	D	A	G	
U.S. v. Cadenas, 445 F.3d 1091 (8th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Mugan, 441 F.3d 622 (8th Cir. 2006)	S	210-262	240	W	D	A	G	
U.S. v. Green, 442 F.3d 677 (8th Cir. 2006)	D	87-105	105	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza-Mendoza, 172 Fed.Appx. 130 (8th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Ramirez-Becerra, 170 Fed.Appx. 982 (8th Cir. 2006)	D	120-135	120	W	D	A	G	
U.S. v. Magana-Suarez, 170 Fed.Appx. 983 (8th Cir. 2006)	I		30	W	D	A	G	
U.S. v. Cabrera-Villegas, 170 Fed.Appx. 990 (8th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Anderson, 170 Fed.Appx. 996 (8th Cir. 2006)	T		210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Arroyo-Santiago, 174 Fed.Appx. 349 (8th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Allaei, 174 Fed. Appx. 350 (8th Cir. 2006)	D	24-30	24	W	D	A	G	
U.S. v. White, 439 F.3d 433 (8th Cir. 2006)	F	30-37	36	W	D	A	G	
U.S. v. Tabor, 439 F.3d 826 (8th Cir. 2006)	D		200	W	D	A	G	
U.S. v. Henderson, 440 F.3d 453 (8th Cir. 2006)	O		63	W	D	A	G	
U.S. v. Jacinto, 168 Fed.Appx. 129 (8th Cir. 20060	F		37	W	D	A	G	
U.S. v. Bates, 167 Fed.Appx. 581 (8th Cir. 2006)	O		10	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Reams, 167 Fed.Appx. 584 (8th Cir. 2006)	F		30	W	D	A	G	
U.S. v. Cain, 167 Fed.Appx. 580 (8th Cir. 2006)	T	168-210	168	W	D	A	G	
U.S. v. Sebastian, 436 F.3d 913 (8th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Alvaro-Reyes, 163 Fed.Appx. 449 (8th Cir. 2006)	D		87	W	D	A	G	
U.S. v. Simmons, 168 Fed.Appx. 124 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Grant, 165 Fed.Appx. 493 (8th Cir. 2006)	D	151-188	170	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tucker, 161 Fed.Appx. 629 (8th Cir. 2006)	D		9	W	D	A	G	
U.S. v. Hill, 163 Fed.Appx. 438 (8th Cir. 2006)	F	188-235	200	W	D	A	G	
U.S. v. Denton, 434 F.3d 1104 (8th Cir. 2006)	D	life	life	W	D	A	G	
U.S. v. Smith, 163 Fed.Appx. 433 (8th Cir. 2006)	T			W	D	A	G	
U.S. v. Reyes, 162 Fed.Appx. 685 (8th Cir. 2006)	D	?-87	87	W	D	A	G	
U.S. v. Artis, 161 Fed.Appx. 627 (8th Cir. 2006)	T		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wade, 435 F.3d 828 (8th Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Dao, 2006 WL 2472749 (8th Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Floyd, 458 F.3d 844 (8th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Pippert, 458 F.3d 844 (8th Cir. 2006)	O		36	W	D	A	G	
U.S. v. Arther, 2006 WL 2372159 (8th Cir. 2006)	F	77-96	96	W	D	A	G	
U.S. v. Wiig, 2006 WL 2321230 (8th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Davis, 457 F.3d 817 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Brown, 2006 WL 2192716 (8th Cir. 2006)	F		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Whitrock, 454 F.3d 866 (8th Cir. 2006)	T	168-210	180	W	D	A	G	
U.S. v. Johnson, 187 Fed.Appx. 669 (8th Cir. 2006)	D, F	240-262	240	W	D	A	G	
U.S. v. Valencia, 186 Fed.Appx. 711 (8th Cir. 2006)	D		180	W	D	A	G	
U.S. v. Pappas, 452 F.3d 767 (8th Cir. 2006)	F	77-96	77	W	D	A	G	
U.S. v. Bowers, 182 Fed.Appx. 624 (8th Cir. 2006)	D, F	135-168	135	W	D	A	G	
U.S. v. Urbina-Hernandez, 182 Fed.Appx. 617 (8th Cir. 2006)	I		48	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mull, 181 Fed.Appx. 610 (8th Cir. 2006)	D	97-?	97	W	D	A	G	
U.S. v. Milk, 447 F.3d 593 (8th Cir. 2006)	O	135-168	135	W	D	A	G	
U.S. v. Annis, 446 F.3d 852 (8th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Lee, 178 Fed.Appx. 603 (8th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Tucker, 178 Fed.Appx. 601 (8th Cir. 2006)	D	70-87	70	W	D	A	G	
U.S. v. Love, 176 Fed.Appx. 708 (8th Cir. 2006)	F		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vasquex-Cardona, 175 Fed.Appx. 105 (8th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Mennen, 175 Fed.Appx. 103 (8th Cir. 2006)	D	70-87	87	W	D	A	G	
U.S. v. Searby, 439 F.3d 961 (8th Cir. 2006)	S	151-180	160	W	D	A	G	
U.S. v. Walker, 439 F.3d 890 (8th Cir. 2006)	T	4-10	5	W	D	A	G	
U.S. v. Sanchez, 169 Fed.Appx. 491 (8th Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Barron, 166 Fed.Appx. 890 (8th Cir. 2006)	D	121-151	136	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Davidson, 437 F.3d 737 (8th Cir. 2006)	D, F		300	W	D	A	G	
U.S. v. Rivera-Moreno, 161 Fed.Appx. 622 (8th Cir. 2006)	D		292	W	D	A	G	
U.S. v. Enos, 161 Fed.Appx. 620 (8th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Mickelson, 433 F.3d 1050 (8th Cir. 2006)	S	41-51	51	W	D	A	G	
U.S. v. Dieken, 432 F.3d 906 (8th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Goodwin, 439 F.3d 928 (8th Cir. 2006)	D	87-108	87	W	D	R	D	S
U.S. v. Okai, 454 F.3d 848 (8th Cir. 2006)	T	2-8	8	W	G	R	G	P

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sauerbry, 2006 WL 3147483 (8th Cir. 2006)	O		12	W	D	A	G	
U.S. v. Caldwell, 2006 WL 2404500 (8th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Valdivia-Perez, 185 Fed.Appx. 543 (8th Cir. 2006)	D, F		life	W	D	A	G	
U.S. v. Walker, 185 Fed.Appx. 554 (8th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Dawn, 180 Fed.Appx. 617 (8th Cir. 2006)	F		180	W	D	A	G	
U.S. v. Atteberry, 447 F.3d 562 (8th Cir. 2006)	S		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Aviles, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Vergara-Viernes, 175 Fed.Appx. 100 (8th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Vaughn, 173 Fed.Appx. 532 (8th Cir. 2006)	F			W	D	A	G	
U.S. v. Gray, 163 Fed.Appx. 448 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Marbach, 163 Fed.Appx. 434 (8th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Stead, 162 Fed.Appx. 678 (8th Cir. 2006)	O			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 159 Fed.Appx. 748 (8th Cir. 2006)	D		70	W	D	A	G	

NINTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Booth, 2006 WL 2521544 (9th Cir. 2006)	T		162	A	D	A	G	
U.S. v. Coppola, 2006 WL 2460804 (9th Cir. 2006)	T		188	A	D	A	G	
U.S. v. Ackerman, 2006 WL 2404573 (9th Cir. 2006)	O		180	A	D	A	G	
U.S. v. Mix, 457 F.3d 906 (9th Cir. 2006)	S & O		Life	A	D	A	G	
U.S. v. Mohamed, 459 F.3d 979 (9th Cir. 2006)	F	12-18	60	A	D	A	G	
U.S. v. Ellsworth, 456 F.3d 1146 (9th Cir. 2006)	F		78	A	D	A	G	
U.S. v. Menz, 2006 WL 2099290 (9th Cir. 2006)	O	30-37	40	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jeakins, 2006 WL 1642654 (9th Cir. 2006)	S		168	A	D	A	G	
U.S. v. DeGeorge, 178 Fed. Appx. 764 (9th Cir. 2006)	T			A	D	A	G	
U.S. v. Williamson, 439 F.3d 1125 (9th Cir. 2006)	S		180	A	D	A	G	
U.S. v. Bad Marriage, 439 F.3d 534 (9th Cir. 2006)	O	33-41	48	A	D	A	G	
U.S. v. Soza-Balderama, 163 Fed. Appx. 571 (9th Cir. 2006)	I		51	A	D	A	G	
U.S. v. Wise, 166 Fed. Appx. 986 (9th Cir. 2006)	O			A	D	A	G	
U.S. v. Guerrieri, 184 Fed. Appx. 630 (9th Cir. 2006)	S		262	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castaneda-Ceja, 2006 WL 3313199	I		52	A	D	A	G	
U.S. v. Espinoza-Cortez, 169 Fed. Appx. 492 (9th Cir. 2006)	I	77-96	102	A	D	A	G	
U.S. v. Mohamed, 2006 WL 3147268 (9th Cir. 2006)	T & O	0-6	18	A	D	A	G	
U.S. v. Roberts, 2006 WL 2136144 (9th Cir. 2006)	O		36	A	D	A	G	
U.S. v. Miqbel, 444 F.3d 1173 (9th Cir. 2006)	O	3-9	12	A	D	R	D	P
U.S. v. Branch, 2006 WL 2373468	T		200	B	D	A	G	
U.S. v. Martinez-De Loza, 2006 WL 2076704	I		40	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Cruz-Lemus, 2006 WL 2087516 (9th Cir. 2006)	I	77-96	48	B	D	A	G	
U.S. v. O'Neill, 2006 WL 2053533 (9th Cir. 2006)	T		24	B	D	A	G	
U.S. v. Cano-Ramirez, 2006 WL 2041497 (9th Cir. 2006)	I		60	B	D	A	G	
U.S. v. Silva, 2006 WL 1962999 (9th Cir. 2006)	I		46	B	D	A	G	
U.S. v. Davis, 182 Fed. Appx. 741 (9th Cir. 2006)	S		60	B	D	A	G	
U.S. v. Hutson, 183 Fed. Appx. 675 (9th Cir. 2006)	T	210-262	180	B	D	A	G	
U.S. v. Reina-Rodriguez, --- F.3d ---, 2006 WL 3302652 (9th Cir. 2006)	I	57-71	51	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Evenilso-Cruz, 176 Fed. Appx. 872 (9th Cir. 2006)	I		30	B	D	A	G	
U.S. v. Usanga, 2006 WL 2661163 (9th Cir. 2006)	T		18	B	D	A	G	
U.S. v. Shpirt, 2006 WL 2102338 (9th Cir. 2006)	T			B	D	A	G	
U.S. v. Lizarraga-Cedano, 2006 WL 2063066	D	Life		B	D	A	G	
U.S. v. Aguilar-Delgado, 2006 WL 2466249 (9th Cir. 2006)	I	57-71	46	B	D	A	G	
U.S. v. Postadan, 2006 WL 3228722 (9th Cir. 2006)	D	292-365	200	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pryce, 2006 WL 2166721 (9th Cir. 2006)	D		60	B	D	A	G	
U.S. v. Rosell-Fernandez, 2006 WL 2063080 (9th Cir. 2006)	I	77-96	60	B	D	A	G	
U.S. v. Landrus, 183 Fed. Appx. 649 (9th Cir. 2006)	D	360-Life	300	B	D	A	G	
U.S. v. Kulgavchuck, 183 Fed. Appx. 647 (9th Cir. 2006)	D	292-365	180	B	D	A	G	
U.S. v. Rocha, 180 Fed. Appx. 660 (9th Cir. 2006)	F	10-16	7	B	D	A	G	
U.S. v. Gonzalez, 178 Fed. Appx. 640 (9th Cir. 2006)	T			B	D	A	G	
U.S. v. Tapia-Piceno, 2006 WL 2669038 (9th Cir. 2006)	D	87-108	74	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tapia-Piceno, 2006 WL 2669038 (9th Cir. 2006)	D	41-51	36	B	D	A	G	
U.S. v. Gibbons, 2006 WL 2358005 (9th Cir. 2006)	T	78-97	60	B	D	A	G	
U.S. v. Gibson, 2006 WL 2357407 (9th Cir. 2006)	T	46-57	30	B	D	A	G	
U.S. v. Fernandez-Esparza, 2006 WL 2136150 (9th Cir. 2006)	I	57-71	54	B	D	A	G	
U.S. v. Khan, 2006 WL 2096059 (9th Cir. 2006)	T		24	B	G	A	D	
U.S. v. Williams, 171 Fed. Appx. 604 (9th Cir. 2006)			15	B	G	A	D	
U.S. v. Atkinson, 180 Fed. Appx. 656 (9th Cir. 2006)	T	77-96	9	B	G	R	G	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Beraldo, 2006 WL 2088168 (9th Cir. 2006)	O	51-63	24	stat. max.	D	A	G	
U.S. v. Ramirez-Campos, 2006 WL 3040050 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Spears, 172 Fed. Appx. 216 (9th Cir. 2006)	D	33-41	36	W	D	A	G	
U.S. v. Bearcub, 2006 WL 2615083 (9th Cir. 2006)	S			W	D	A	G	
U.S. v. Garcia-Cortez, 2006 WL 2466919 (9th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Anzo-Enriquez, 2006 WL 2990118 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Nichols, 464 F.3d 1117 (9th Cir. 2006)	F	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera-Lara, 2006 WL 2661172 (9th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Altamirano-Ortiz, 2006 WL 2661145 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Garcia-Rubio, 2006 WL 2661139 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Whitright, 2006 WL 2563474 (9th Cir. 2006)	O		108	W	D	A	G	
U.S. v. Vasquez, 2006 WL 2521446 (9th Cir. 2006)				W	D	A	G	
U.S. v. Maciel-Vasquez, 458 F.3d 994 (9th Cir. 2006)	I		36	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morales, 2006 WL 2233228 (9th Cir. 2006)	O	4-10	10	W	D	A	G	
U.S. v. Gotty, 2006 WL 2096084 (9th Cir. 2006)	T		170	W	D	A	G	
U.S. v. Arrendondo, 2006 WL 2076564 (9th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Gasca-Morado, 2006 WL 2085396 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Castro-Muro, 2006 WL 2063063 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Miranda-Sanchez, 2006 WL 1878689 (9th Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Clark, 452 F.3d 1082 (9th Cir. 2006)	F		46	W	D	A	G	
U.S. v. Vega-Barajas, 185 Fed. Appx. 579 (9th Cir. 2006)	I, F		57	W	D	A	G	
U.S. v. Reyes-Osorto, 184 Fed. Appx. 628 (9th Cir. 2006)	I		87	W	D	A	G	
U.S. v. Lopez-Lopez, 180 Fed. Appx. 680 (9th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Oros-Rodriguez, 180 Fed. Appx. 677 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Larumbe-Zuniga, 182 Fed. Appx. 651 (9th Cir. 2006)			77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Atondo-Santos, 178 Fed. Appx. 760 (9th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	57-71	66	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	41-51	46	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	41-51	50	W	D	A	G	
U.S. v. Lacson, 177 Fed. Appx. 751 (9th Cir. 2006)	T	30-37	30	W	D	A	G	
U.S. v. Romero-Martinez, 443 F.3d 1185 (9th Cir. 2006)	F	51-63	54	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bowman, 175 Fed. Appx. 834 (9th Cir. 2006)	S	33-41	33	W	D	A	G	
U.S. v. Maldonado-Gutierrez, 175 Fed. Appx. 795 (9th Cir. 2006)				W	D	A	G	
U.S. v. Becerra-Cortez, 170 Fed. Appx. 481 (9th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Espino-Acata, 170 Fed. Appx. 467 (9th Cir. 2006)	I	46-57	57	W	D	A	G	
U.S. v. Jari, 168 Fed. Appx. 796 (9th Cir. 2006)	T	33-41	33	W	D	A	G	
U.S. v. Barrientos-Maldonado, 168 Fed. Appx. 829 (9th Cir. 2006)	I		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sylvester Norman Knows His Gun, III, 438 F.3d 913 (9th Cir. 2006)	S	121-151	132	W	D	A	G	
U.S. v. Plouffe, 445 F.3d 1126 (9th Cir. 2006)	O	57-71	71	W	D	A	G	
U.S. v. Valdovinos, 2006 WL 2661236 (9th Cir. 2006)		360-?	360	W	D	A	G	
U.S. v. Day, 2006 WL 2071038 (9th Cir. 2006)	F		33	W	D	A	G	
U.S. v. Hernandez-Garcia, 2006 WL 1933088 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Souza, 176 Fed. Appx. 852 (9th Cir. 2006)	D			W	D	A	G	
U.S. v. Fajardo, 175 Fed. Appx. 922 (9th Cir. 2006)	T	15-21	15	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sifuentes Ibarra, 171 Fed. Appx. 195 (9th Cir. 2006)	I		64	W	D	A	G	
U.S. v. Espinoza-Cano, 456 F.3d 1126 (9th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Martinez, 177 Fed. Appx. 635 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Mares-Hernandez, 163 Fed. Appx. 561 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Alarid, 2006 WL 3026176 (9th Cir. 2006)	D		130	W	D	A	G	
U.S. v. Soukas, 2006 WL 3005628 (9th Cir. 2006)	T	92-115	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza-Santiago, 2006 WL 3017524 (9th Cir. 2006)	I	57-71	63	W	D	A	G	
U.S. v. Nichol, 2006 WL 2818056 (9th Cir. 2006)	D	121-151	121	W	D	A	G	
U.S. v. Rice, 2006 WL 2818056 (9th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Guzman-Valencia, 2006 WL 2827868 (9th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Bromlie, 2006 WL 2827857 (9th Cir. 2006)	F	77-96	96	W	D	A	G	
U.S. v. Marquez-Lerma, 2006 WL 2827735 (9th Cir. 2006)	D		151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Cisneros-Gonzalez, 2006 WL 2661169 (9th Cir. 2006)	I		51	W	D	A	G	
U.S. v. Ramirez-Cruz, 2006 WL 2637909 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Delgado, 2006 WL 2637478 (9th Cir. 2006)	I	33-41	33	W	D	A	G	
U.S. v. Tran, 2006 WL 2521442 (9th Cir. 2006)		188-235	212	W	D	A	G	
U.S. v. Sanchez-Macias, 2006 WL 2497593 (9th Cir. 2006)	D		48	W	D	A	G	
U.S. v. Ochoa, 2006 WL 2460723 (9th Cir. 2006)	D & O	70-87	87	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Squetimkin, 2006 WL 2233247 (9th Cir. 2006)	S	63-78	78	W	D	A	G	
U.S. v. Zuniga-Camarena, 2006 WL 2170516 (9th Cir. 2006)	I	8-14	13	W	D	A	G	
U.S. v. Serrano-Aguilar, 2006 WL 2096080 (9th Cir. 2006)	I	24-36	24	W	D	A	G	
U.S. v. Hernandez-Toscano, 2006 WL 2136152 (9th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Serrano, 2006 WL 2085241 (9th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Garner, 2006 WL 2071448 (9th Cir. 2006)	D & T		98	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gable, 2006 WL 2074670 (9th Cir. 2006)	O	12-18	12	W	D	A	G	
U.S. v. McGrew, 2006 WL 2070762 (9th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Gordiano-Vergara, 2006 WL 1877207 (9th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Wideman, 187 Fed. Appx. 758 (9th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Martinez-Huerts, 187 Fed. Appx. 721 (9th Cir. 2006)	I	63-78	78	W	D	A	G	
U.S. v. Guinn, 186 Fed. Appx. 798 (9th Cir. 2006)	D	10-16	13	W	D	A	G	
U.S. v. Flowers, 185 Fed. Appx. 669 (9th Cir. 2006)	D	292-365	312	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Marshall, 185 Fed. Appx 578 (9th Cir. 2006)	O	27-33	27	W	D	A	G	
U.S. v. Ortega-Frutos, 2006 WL 3313321 (9th Cir. 2006)	I	77-96	96	W	D	A	G	
U.S. v. Duenas-Jimenez, 2006 WL 3313203 (9th Cir. 2006)	D	51-63	51	W	D	A	G	
U.S. v. Blanco-Gallegos, 2006 WL 3313297 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Deminter, 2006 WL 3312034 (9th Cir. 2006)	T	63-78	63	W	D	A	G	
U.S. v. Lozano Castaneda, 2006 WL 3308361 (9th Cir. 2006)	D	30-37	30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Balitan, 182 Fed. Appx. 636 (9th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Andres, 178 Fed. Appx. 736 (9th Cir. 2006)	O	41-51	41	W	D	A	G	
U.S. v. Andres, 178 Fed. Appx. 736 (9th Cir. 2006)	O	63-78	65	W	D	A	G	
U.S. v. Mott, 178 Fed. Appx. 634 (9th Cir. 2006)	D	27-33	27	W	D	A	G	
U.S. v. Montalvo-Villa, 177 Fed. Appx. 724 (9th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Bobadilla-Diaz, 176 Fed. Appx. 858 (9th Cir. 2006)	T	10-16	16	W	D	A	G	
U.S. v. Rodriquez-Rodriguez, 441 F.3d 767 (9th Cir. 2006)	I	77-96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Medina-Leon, 172 Fed. Appx. 753 (9th Cir. 2006)	I	21-27	27	W	D	A	G	
U.S. v. Calvillo-Alvarez, 166 Fed. Appx. 983 (9th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Canter, 164 Fed. Appx. 648 (9th Cir. 2006)			51	W	D	A	G	
U.S. v. Martinez-Rosales, 164 Fed. Appx. 618 (9th Cir. 2006)	I	12-18	18	W	D	A	G	
U.S. v. Wenee, 2006 WL 3007727 (9th Cir. 2006)	F	37-46	42	W	D	A	G	
U.S. v. Garcia-Gonzalez, 2006 WL 2639376 (9th Cir. 2006)	I		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morales-Castro, 2006 WL 2466274 (9th Cir. 2006)	I		54	W	D	A	G	
U.S. v. McDonald, 178 Fed. Appx. 643 (9th Cir. 2006)	T	41-51	41	W	D	A	G	
U.S. v. Jacques, 170 Fed. Appx. 476 (9th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Ramos-Contreras, 2006 WL 2099778 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Lucero, 164 Fed. Appx. 594 (9th Cir. 2006)	D			W	D	A	G	
U.S. v. Molesworth, 2006 WL 2404576 (9th Cir. 2006)	T		13	W	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006)	I		46	W	D	R	D	P
U.S. v. Robles-Ayala, 2006 WL 2612686 (9th Cir. 2006)	I	46-57	52	W	D	R	D	P
U.S. v. Flores-Pimienta, 2006 WL 2404503 (9th Cir. 2006)	I	15-21	15	W	D	R	D	P
U.S. v. Vivas, 2006 WL 2357819 (9th Cir. 2006)	F	84-105	84	W	D	R	D	P
U.S. v. Aguilar, 169 Fed. Appx. 503 (9th Cir. 2006)	D	87-108	96	W	D	R	D	P
U.S. v. Ventura, 164 Fed. Appx. 600 (9th Cir. 2006)	T	8-14	12	W	G	A	D	
U.S. v. Vergara-Romano, 2006 WL 2087552 (9th Cir. 2006)	I	77-96	54	W (fast track max)	D	A	G	

TENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Toliver, 183 Fed. Appx. 745 (10th Cir. 2006)	O	8-14	22	A	D	A	G	
U.S. v. Roubideaux, 176 Fed. Appx. 941 (10th Cir. 2006)	O	5-11	18	A	D	A	G	
U.S. v. Baker, 175 Fed. Appx. 958 (10th Cir. 2006)	O	188-235	264	A	D	A	G	
U.S. v. Valtierra-Rojas, --F.3d--, 2006 WL 3237187 (10th Cir. 2006)	I	21-27	60	A	D	A	G	
U.S. v. Bishop, --F.3d--, 2006 WL 3237027 (10th Cir. 2006)	F	46-57	78	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pettigrew, --F.3d--, 2006 WL 2946893 (10th Cir. 2006)	O	100-125	126	A	D	A	G	
U.S. v. Cordova, 461 F.3d 1184 (10th Cir. 2006)	O	9-21	36	A	D	A	G	
U.S. v. Dallah, 2006 WL 2294848 (10th Cir. 2006)	O	15-21	36	A	D	A	G	
U.S. v. Terrell, 445 F.3d 1261 (10th Cir. 2006)	D	92-115	78	B	D	A	G	
U.S. v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006)	I	41-51	30	B	D	A	G	
U.S. v. Franklin, 178 Fed. Appx. 776 (10th Cir. 2006)	T	21-27	18	B	D	A	G	
U.S. v. Hernandez-Bustos, 2006 WL 2361642 (10th Cir. 2006)	D	135-	100	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sutherland, 2006 WL 2328752 (10th Cir. 2006)	S	360-Life	240	B	D	A	G	
U.S. v. Mosley, 457 F.3d 1150 (10th Cir. 2006)	D	188-235	120	B	D	A	G	
U.S. v. Cage, 451 F.3d 585 (10th Cir. 2006)	D	46-57	6 days	B	G	R	G	S
U.S. v. Bailey 187 Fed. Appx. 846 (10th Cir. 2006)	D, F	136-151	120	Stat Max	D	A	G	
U.S. v. Bowie, 2006 WL 2258972 (10th Cir. 2006)	D, F	210-262	180	Stat Max	D	A	G	
U.S. v. Chavez, 187 Fed. Appx. 861 (10th Cir. 2006)	O	0-6	0	W	D	A	G	
U.S. v. Gillespie, 452 F.3d 1183 (10th Cir. 2006)	O		468	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sagaste-Cruz, 187 Fed. Appx. 804 (10th Cir. 2006)	D, F	Life	Life	W	D	A	G	
U.S. v. Hernandez-Juarez, 185 Fed. Appx. 758 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Mendoza-Guardiola, 184 Fed. Appx. 791 (10th Cir. 2006)	I		24	W	D	A	G	
U.S. v. Loza, 184 Fed. Appx. 772 (10th Cir. 2006)	D, F	78-97	78	W	D	A	G	
U.S. v. Reyes-Soto, 184 Fed. App. 777 (10th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Serna-Gomez, 184 Fed. Appx. 768 (10th Cir. 2006)	I	70-87	70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Delgado-Lucio, 184 Fed. Appx. 737 (10th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Keeble, 184 Fed. Appx. 756 (10th Cir. 2006)	F	92-115	115	W	D	A	G	
U.S. v. Ramirez-Munoz, 184 Fed. Appx. 741 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Johnson, 184 Fed. Appx. 746 (10th Cir. 2006)	D	41-51	46	W	D	A	G	
U.S. v. Jardine, 184 Fed. Appx. 728 (10th Cir. 2006)	F		108	W	D	A	G	
U.S. v. Aguilar-Duenas, 184 Fed. Appx. 685 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Thomas, 183 Fed. Appx. 742 (10th Cir. 2006)	D	151-188	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vences-Flores, 177 Fed. Appx. 791 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Lopez-Flores, 444 F.3d 1218 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Orozco-Sanchez, 2006 WL 991109 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Bodenheimer, 175 Fed. Appx. 978 (10th Cir. 2006)	S		33	W	D	A	G	
U.S. v. Rodriguez-Rojo, 175 Fed. Appx. 982 (10th Cir. 2006)	I	24-30	24	W	D	A	G	
U.S. v. Torres, 176 Fed. Appx. 915 (10th Cir. 2006)	D	210-262	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Salome-Gonzales, 174 Fed. Appx. 438 (10th Cir. 2006)	D	70-87	70	W	D	A	G	
U.S. v. Rodriguez-Quintanilla, 442 F.3d 1254 (10th Cir. 2006)	O			W	D	A	G	
U.S. v. Marquez-Olivas, 172 Fed. Appx. 855 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Mares, 441 F.3d 1152 (10th Cir. 2006)	D	51-63	51	W	D	A	G	
U.S. v. Ramos-Perez, 171 Fed. Appx. 727 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Galarza-Payan, 441 F.3d 885 (10th Cir. 2006)	I	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 169 Fed. Appx. 510 (10th Cir. 2006)	T		41	W	D	A	G	
U.S. v. Pina-Nunez, 167 Fed. Appx. 66 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Hernandez-Rodriguez, 167 Fed. Appx. 56 (10th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Hughes, 167 Fed. Appx. 59 (10th Cir. 2006)	O	15-21	15	W	D	A	G	
U.S. v. Davis, 437 F.3d 989 (10th Cir. 2006)	F, O	360-life	360	W	D	A	G	
U.S. v. Tapia-Carrasco, 165 Fed. Appx. 685 (10th Cir. 2006)	D	41-51	46	W	D	A	G	
U.S. v. Medrano, 164 Fed. Appx. 737 (10th Cir. 2006)	D	97-121	97	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Reyes-Armendariz, 163 Fed. Appx. 688 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Rockey, 449 F.3d 1099 (10th Cir. 2006)	D		322	W	D	A	G	
U.S. v. Rosales-Trujillo, 180 Fed. Appx. 835 (10th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Salazar-Alpizar, 182 Fed. Appx. 757 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Flores-Perez, 180 Fed. Appx. 823 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Vaca-Perez, 180 Fed. Appx. 779 (10th Cir. 2006)	I	41-51	41	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dixon, 179 Fed. Appx. 541 (10th Cir. 2006)	D	188-235	204	W	D	A	G	
U.S. v. Madrid, 178 Fed. Appx. 823 (10th Cir. 2006)	D	121-151	135	W	D	A	G	
U.S. v. Hernandez-Arango, 177 Fed. Appx. 848 (10th Cir. 2006)	I	30-37	33	W	D	A	G	
U.S. v. Oldham, 177 Fed. Appx. 842 (10th Cir. 2006)	S	135-168	135	W	D	A	G	
U.S. v. Gutierrez-Ayala, 179 Fed. Appx. 464 (10th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Salgado-Hernandez, 179 Fed. Appx. 481 (10th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gomez-Castillo, 179 Fed. Appx. 484 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Perea-Gonzales, 179 Fed. Appx. 474 (10th Cir. 2006)	I	92-115	92	W	D	A	G	
U.S. v. Obando-Landa, 179 Fed. Appx. 477 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Sanchez-Valdez, 179 Fed. Appx. 449 (10th Cir. 2006)	I		42	W	D	A	G	
U.S. v. Somerville, 179 Fed. Appx. 460 (10th Cir. 2006)	D	324-405	324	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murriega-Santos, 2006 WL 3291683 (10th Cir. 2006)	I	30-37	30	W	D	A	G	
U.S. v. Archuleta, 2006 WL 2963279 (10th Cir. 2006)	T	151-188	188	W	D	A	G	
U.S. v. Ochoa-Villarruel, 2006 WL 2868246 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Flores, 2006 WL 2774035 (10th Cir. 2006)	D		71	W	D	A	G	
U.S. v. Brereton, 2006 WL 2678029 (10th Cir. 2006)	O	12-18	12	W	D	A	G	
U.S. v. Perez-Elvira, 2006 WL 2640527 (10th Cir. 2006)	I	15-21	18	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ochoa-Birueta, 2006 WL 2338071 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Tellez-Acosta, 183 Fed. Appx. 780 (10th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Yelloweagle, 181 Fed. Appx. 734 (10th Cir. 2006)	S		12	W	D	A	G	
U.S. v. Wortman, 182 Fed. Appx. 755 (10th Cir. 2006)	O	3-9	6	W	D	A	G	
U.S. v. Machuca, 172 Fed. Appx. 902 (10th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Boyd, 172 Fed. Appx. 841 (10th Cir. 2006)	F	151-188	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Demeulenaere, 2006 WL 3238102 (10th Cir. 2006)	D		68	W	D	A	G	
U.S. v. Segovia-Torres, 2006 WL 3222260 (10th Cir. 2006)	I	63-78	63	W	D	A	G	
U.S. v. Miller, 2006 WL 3117912 (10th Cir. 2006)	D	110-137	120	W	D	A	G	
U.S. v. Padilla, 2006 WL 3095836 (10th Cir. 2006)	D	70-87	76	W	D	A	G	
U.S. v. Molina-Rascon, 2006 WL 3086714 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Wilson, 2006 WL 3072766 (10th Cir. 2006)	F	70-87	70	W	D	A	G	
U.S. v. Wade, 2006 WL 3059929 (10th Cir. 2006)	O		100	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Clark, 2006 WL 2963958 (10th Cir. 2006)	O	150-157	150	W	D	A	G	
U.S. v. Munoz-Ortiz, 2006 WL 2925296 (10th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Gutierrez-Palma, 2006 WL 2925293 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Howell, 2006 WL 2868241 (10th Cir. 2006)	D, F	188-235	189	W	D	A	G	
U.S. v. McDonald, 2006 WL 2868231 (10th Cir. 2006)	T		71	W	D	A	G	
U.S. v. Nava-Zamora, 2006 WL 2848085 (10th Cir. 2006)	I	27-33	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perkins, 2006 WL 2811295 (10th Cir. 2006)	F	70-87	70	W	D	A	G	
U.S. v. Caballero-Robles, 2006 WL 2811293 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Velasquez, 2006 WL 2811299 (10th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Martinez-Jimenez, 464 F.3d 1205 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Kostich, 2006 WL 2709665 (10th Cir. 2006)	O	51-63	63	W	D	A	G	
U.S. v. Herula, 464 F.3d 1132 (10th Cir. 2006)	T	188-235	188	W	D	A	G	
U.S. v. Leiker, 2006 WL 2522494 (10th Cir. 2006)	D	235-293	240	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ramirez-Jimenez, 2006 WL 2522484 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Perez-Lopez, 2006 WL 2501422 (10th Cir. 2006)	I	57-71	60	W	D	A	G	
U.S. v. Branson, 463 F.3d 1110 (10th Cir. 2006)	S	51-	51	W	D	A	G	
U.S. v. Torres-Duenas, 461 F.3d 1178 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Knox, 2006 WL 2441495 (10th Cir. 2006)	D			W	D	A	G	
U.S. v. Paredes, 461 F.3d 1190 (10th Cir. 2006)	T	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lopez-Vasquez, 2006 WL 2391679 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. McCullough, 457 F.3d 1150 (10th Cir. 2006)	D		380	W	D	A	G	
U.S. v. Herrera-Vasquez, 2006 WL 2277955 (10th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Cordova-Arevalo, 456 F.3d 1229 (10th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Soto-Soto, 2006 WL 2212080 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Anderson, 2006 WL 2213077 (10th Cir. 2006)	D		113	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lopez-Camas, 2006 WL 2171491 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Garcia, 2006 WL 2076799 (10th Cir. 2006)	F	77-96	77	W	D	A	G	
U.S. v. Davis, 2006 WL 2076803 (10th Cir. 2006)	F	57-71	57	W	D	A	G	
U.S. v. Martinez, 455 F.3d 1127 (10th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Osborne, 2006 WL 2065177 (10th Cir. 2006)	F	15-21	15	W	D	A	G	
U.S. v. Lefebvre, 189 Fed. Appx. 767 (10th Cir. 2006)	T	210-262	240	W	D	A	G	
U.S. v. Bustamante, 454 F.3d 1200 (10th Cir. 2006)	D	70-87	78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Christiansen, 188 Fed. Appx. 767 (10th Cir. 2006)	O	151-188	180	W	D	A	G	
U.S. v. Vaca-Perez, 178 Fed. Appx. 841 (10th Cir. 2006)	I	30-37	30	W	D	R	D	P
U.S. v. Sanchez-Juarez, 446 F.3d 1109 (10th Cir. 2006)	I	41-51	41	W	D	R	D	P
U.S. v. Serna-Valdiviezo, 2006 WL 2328745 (10th Cir. 2006)	I	46-57	57	W	D	R	D	P

ELEVENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez, 2006 WL 3078934 (11th Cir. 2006)	I	57-71	120	A	D	A	G	
U.S. v. Wesley, 2006 WL 2924070 (11th Cir. 2006)	D	5-11	36	A	D	A	G	
U.S. v. Herrin, 2006 WL 2873201 (11th Cir. 2006)	T, D	6-12	24	A	D	A	G	
U.S. v. Matthews, 2006 WL 2789850 (11th Cir. 2006)	F	92-115	120	A	D	A	G	
U.S. v. Reddick, 2006 WL 1683461 (11th Cir. 2006)	T	110-137	240	A	D	A	G	
U.S. v. Valnor, 451 F.3d 744 (11th Cir. 2006)	T, O	15-21	28	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ford, 2006 WL 1490159 (11th Cir. 2006)	D	5-11	24	A	D	A	G	
U.S. v. Hughes, 2006 WL 1308564 (11th Cir. 2006)	I	33-41	60	A	D	A	G	
U.S. v. Perkins, 2006 WL 1228722 (11th Cir. 2006)	T, O	41-51	96	A	D	A	G	
U.S. v. Hutchinson, 2006 WL 1217876 (11th Cir. 2006)	F, T	8-14	36	A	D	A	G	
U.S. v. Dass, 2006 WL 1159052 (11th Cir. 2006)	F	46-57	72	A	D	A	G	
U.S. v. Eldick, 443 F.3d 783 (11th Cir. 2006)	D, T	87-108	180	A	D	A	G	
U.S. v. Reeves, 2006 WL 684476 (11th Cir. 2006)	T, O	15-21	60	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Germany, 2006 WL 940665 (11th Cir. 2006)	T, F		58	A	D	A	G	
U.S. v. Hardy, 2006 WL 1374500 (11th Cir. 2006)	D	5-11	24	A	D	A	G	
U.S. v. Moore, 443 F.3d 790 (11th Cir. 2006)	D	3-9	18	A	D	A	G	
U.S. v. O'Rourke, 2006 WL 2567600 (11th Cir. 2006)	T	33-41	60	A	D	A	G	
U.S. v. Jose, 2006 WL 2329361 (11th Cir. 2006)	D	60-71	80	A	D	A	G	
U.S. v. Irizarry, 458 F.3d 1208 (11th Cir. 2006)	O	41-51	60	A	D	A	G	
U.S. v. Square, 2006 WL 2243020 (11th Cir. 2006)	D, F	37-46	51	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hendricks, 2006 WL 1914599 (11th Cir. 2006)	T	10-16	30	A	D	A	G	
U.S. v. Pugh, 2006 WL 27270 (11th Cir. 2006)	F		210	A	D	A	G	
U.S. v. Chacon-Blanco, 2006 WL 2400942 (11th Cir. 2006)	D	3-9	24	A	D	A	G	
U.S. v. Perkins, 2006 WL 1716053 (11th Cir. 2006)	T	37-46	27	B	D	A	G	
U.S. v. Taylor, 2006 WL 1697177 (11th Cir. 2006)	D	life	360	B	D	A	G	
U.S. v. Luna-Mora, 2006 WL 1236788 (11th Cir. 2006)	I	12-18	8	B	D	A	G	
U.S. v. Martin, 2006 WL 1130764 (11th Cir. 2006)	D	151-188	120	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 2006 WL 839077 (11th Cir. 2006)	D	151-188	96	B	D	A	G	
U.S. v. Hill, 2006 WL 648019 (11th Cir. 2006)	D	292-365	250	B	D	A	G	
U.S. v. Sweeting, 437 F.3d 1105 (11th Cir. 2006)	D	33-41	24	B	D	A	G	
U.S. v. Hickman, 2006 WL 988466 (11th Cir. 2006)	D	188-235	150	B	D	A	G	
U.S. v. Smith, 2006 WL 1410053 (11th Cir. 2006)	T, O	life (300)	27	B	D	A	G	
U.S. v. Pitts, 2006 WL 2052728 (11th Cir. 2006)	D	360-life	300	B	D	A	G	
U.S. v. Lewis, 2006 WL 2011502 (11th Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. Wilks, 464 F.3d 1240 (11th Cir. 2006)	D	262-367	212	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thompson, 2006 WL 1889745 (11th Cir. 2006)	D	360-life	240	B	D	A	G	
U.S. v. Harrison, 2006 WL 1881439 (11th Cir. 2006)	D		90	B	D	A	G	
U.S. v. Owens, 464 F.3d 1252 (11th Cir. 2006)	T, O		60	B	D	A	G	
U.S. v. Morales, 2006 WL 940643 (11th Cir. 2006)	D	188-235	141	B	D	A	G	
U.S. v. Mathis, 2006 WL 2087568 (11th Cir. 2006)	O	57-71	36	B	D, G	A		
U.S. v. Gray, 453 F.3rd 1323 (11th Cir. 2006)	S	151-188	72	B	G	A	D	
U.S. v. Halsema, 2006 WL 1229005 (11th Cir. 2006)	S	57-71	24	B	G	A	D	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vawter, 2006 WL 325745 (11th Cir. 2006)	T	24-30	6	B	G	A	D	
U.S. v. Montgomery, 2006 WL 284205 (11th Cir. 2006)	T		8	B	G	A	D	
U.S. v. Williams, 456 F.3d 1353 (11th Cir. 2006)	D	360-life	204	B	G	R	G	S
U.S. v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006)	I	46-57	30	B	G	R	G	S
U.S. v. Martin, 455 F.3d 1227 (11th Cir. 2006)	T, O	108-135	7 days	B	G	R	G	S
U.S. v. Crisp, 454 F.3d 1285 (11th Cir. 2006)	T, O	6-12	5 hours	B	G	R	G	S
U.S. v. Soto, 2006 WL 3327649 (11th Cir. 2006)	F	60	9	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Alexander, 2006 WL 2591877 (11th Cir. 2006)	F	135-168	180	mand. Min.	D	A	G	
U.S. v. Luong, 2006 WL 760264 (11th Cir. 2006)	T		136	W	D	A	G	
U.S. v. Valladares, 2006 WL 176936 (11th Cir. 2006)	D	235-293	240	W	D	A	G	
U.S. v. Cifuentes-Prado, 2006 WL 167453 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Jones, 2006 WL 3285272 (11th Cir. 2006)	D, F	46-57	46	W	D	A	G	
U.S. v. Hickson, 2006 WL 3208680 (11th Cir. 2006)	D, F	57-71	57	W	D	A	G	
U.S. v. Henry, 2006 WL 3228402 (11th Cir. 2006)	T	21-27	24	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Small, 2006 WL 3231277 (11th Cir. 2006)	F		151	W	D	A	G	
U.S. v. Baptiste, 2006 WL 3147302 (11th Cir. 2006)	O		9	W	D	A	G	
U.S. v. Martin, 2006 WL 3203937 (11th Cir. 2006)	D, F	188-235	229	W	D	A	G	
U.S. v. Gordon, 2006 WL 3147287 (11th Cir. 2006)	D, F			W	D	A	G	
U.S. v. Smith 2006 WL 3102314 (11th Cir. 2006)	D, F		90	W	D	A	G	
U.S. v. Campaz, 2006 WL 3090546 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Gaddis, 2006 WL 3090139 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. DeAngelis, 2006 WL 3082674 (11th Cir. 2006)	T, O	292-365	300	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vargas-Medina, 2006 WL 3084287 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Tiu, 2006 WL 3044407 (11th Cir. 2006)	I	57-61	57	W	D	A	G	
U.S. v. Aguirre, 2006 WL 3024708 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Harrington, 2006 WL 3024706 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Casanova, 2006 WL 2990089 (11th Cir. 2006)	D	324-405	324	W	D	A	G	
U.S. v. Vargas, 2006 WL 2990091 (11th Cir. 2006)	I	8-14	12	W	D	A	G	
U.S. v. Allowitz, 2006 WL 2952740 (11th Cir. 2006)	O	121-151	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santiago, 2006 WL 2946882 (11th Cir. 2006)	I	15-21	21	W	D	A	G	
U.S. v. Whelan, 2005 WL 2927353 (11th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Williams, 2006 WL 2877901 (11th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Herrera-Aguilar, 2006 WL 2789847 (11th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Maysonet, 2006 WL 2769414 (11th Cir. 2006)	F	188-235	188	W	D	A	G	
U.S. v. Moreno, 2006 WL 2826937 (11th Cir. 2006)	D	135-168	144	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 2006 WL 2817541 (11th Cir. 2006)	D	70-87	78	W	D	A	G	
U.S. v. Johnson, 2006 WL 2805652 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Motes, 2006 WL 2769576 (11th Cir. 2006)	F	30-37	30	W	D	A	G	
U.S. v. Soliman, 2006 WL 1813902 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Abusaid, Jr., 2006 WL 1824025 (11th Cir. 2006)	D, F	97-124	97	W	D	A	G	
U.S. v. Turner, 2006 WL 1785125 (11th Cir. 2006)	S		360	W	D	A	G	
U.S. v. Gonzalez, 2006 WL 1761082 (11th Cir. 2006)	I	6-12	12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz, 2006 WL 1746891 (11th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Brown, 2006 WL 1746932 (11th Cir. 2006)	T	84-105	105	W	D	A	G	
U.S. v. Perkins, WL 1716053 (11th Cir. 2006)	T	37-46	46	W	D	A	G	
U.S. v. Arredondo, 2006 WL 1697130 (11th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Hernandez, 2006 WL 1674270 (11th Cir. 2006)	D		60	W	D	A	G	
U.S. v. Portocabrero, 2006 WL 1674321 (11th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Holmes, 2006 WL 1674320 (11th Cir. 2006)	F		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dowd, 451 F.3d 1244 (11th Cir. 2006)	T, F	188-235	221	W	D	A	G	
U.S. v. Johnson, 451 F.3d 1239 (11th Cir. 2006)	S	life	1680	W	D	A	G	
U.S. v. Ortiz-Castro, 2006 WL 1519974 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Godinez-Santos, 2006 WL 1490119 (11th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Allen, 2006 WL 1410122 (11th Cir. 2006)	D	262-327	327	W	D	A	G	
U.S. v. Ruben, 2006 WL 1388736 (11th Cir. 2006)	T	41-51	48	W	D	A	G	
U.S. v. Portocarrero, 2006 WL 1342655 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ortiz-Delgado, 451 F.3d 752 (11th Cir. 2006)	S	57-71	60	W	D	A	G	
U.S. v. Rolle, 2006 WL 1582189 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Umbacia, 2006 WL 1582062 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Santacruz, 2006 WL 1559770 (11th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Velasquez, 2006 WL 1582190 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Bent, 2006 WL 1582191 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Sprague, 2006 WL 1675936 (11th Cir. 2006)	T		33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia-Delgado, 2006 WL 1626935 (11th Cir. 2006)	I	46-57	51	W	D	A	G	
U.S. v. Joseph, 2006 WL 1626928 (11th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Laster, 2006 WL 1626972 (11th Cir. 2006)	F	84-105	96	W	D	A	G	
U.S. v. Hernandez, 2006 WL 1697526 (11th Cir. 2006)	I	77-96	80	W	D	A	G	
U.S. v. Vela, 2006 WL 1737387 (11th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Ludovico, 2006 WL 1342832 (11th Cir. 2006)	F, T		78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McElroy, 2006 WL 1228707 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Plata-Mora, 2006 WL 1217877 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Ramirez-Gutierrez, 2006 WL 1217878 (11th Cir. 2006)	I	51-63	60	W	D	A	G	
U.S. v. Vente, 2006 WL 1217875 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Polchantara, 2006 WL 1214191 (11th Cir. 2006)	S	33-41	33	W	D	A	G	
U.S. v. Armas, 2006 WL 1217871 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mandhal, 2006 WL 1168806 (11th Cir. 2006)	O		168	W	D	A	G	
U.S. v. Patel, 2006 WL 1130866 (11th Cir. 2006)	T	33-41	48	W	D	A	G	
U.S. v. Thomas, 446 F.3d 1348 (11th Cir. 2006)	T, O	121-151	121	W	D	A	G	
U.S. v. Angulo Hernandez, 2006 WL 994076 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Giraldo, 2006 WL 988709 (11th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Stumpner, 2006 WL 869611 (11th Cir. 2006)	D, F		292	W	D	A	G	
U.S. v. Moore, 2006 WL 887742 (11th Cir. 2006)	F	210-262	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sinisterra-Garcia, 2006 WL 826071 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Lee, 2006 WL 771179 (11th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Garrett, 2006 WL 770645 (11th Cir. 2006)	T, F, O	92-115	92	W	D	A	G	
U.S. v. Flores, WL 2006 891033 (11th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Colorado, 2006 WL 622740 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Cruz, 2006 WL 620539 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Tapias-Vera, 2006 WL 620618 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	324-405	328	W	D	A	G	
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	292-365	328	W	D	A	G	
U.S. v. Daniels, 2006 WL 542560 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Berrio, 2006 WL 467991 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Williams, 2006 WL 463203 (11th Cir. 2006)	T, O	92-115	92	W	D	A	G	
U.S. v. Armas, 2006 WL 1217871 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Esperance, 2006 WL 250782 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Hutchins, 2006 WL 1159388 (11th Cir. 2006)	O		63	W	D	A	G	
U.S. v. Oduardo, 2006 WL 231645 (11th Cir. 2006)	D, F		210	W	D	A	G	
U.S. v. Valentierra-Sanchez, 2006 WL 167455 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Love, 2006 WL 133414 (11th Cir. 2006)	S	70-87	70	W	D	A	G	
U.S. v. Baez-Berrios, 2006 WL 139198 (11th Cir. 2006)	I		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perlaza, 2006 WL 707130 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Murillo-Moya, 2006 WL 688963 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Abram, 2006 WL 690850 (11th Cir. 2006)	T, F		188	W	D	A	G	
U.S. v. Harden, 2006 WL 690850 (11th Cir. 2006)	T, F		648	W	D	A	G	
U.S. v. Valdez, 2006 WL 648012 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Gomez-Lopez, 2006 WL 1004860 (11th Cir. 2006)	I	41-51	46	W	D	A	G	
U.S. v. Sanders, 2006 WL 1008383 (11th Cir. 2006)	D		324	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Stripling, 2006 WL 1071848(11th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Arboleda, 2006 WL 1168797 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Munoz-Arenas, 2006 WL 1144569 (11th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Shemesh, 2006 WL 1529078 (11th Cir. 2006)	D		78	W	D	A	G	
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Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Eighth Circuits

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a district court's application of the Sentencing Guidelines produces a presumptively reasonable sentence.

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INTEREST OF *AMICUS CURIAE*[1]

Congress's driving motivation in the Sentencing Reform Act of 1984 was to reduce unwarranted disparity in federal sentencing, so that "defendants with similar records who have been found guilty of similar criminal conduct" are treated in like fashion, regardless of the judge who imposes the sentence. 28 U.S.C. § 991(b)(1)(B); *see* 18 U.S.C. § 3553(a)(6). To accomplish that purpose, Congress established the United States Sentencing Commission (the "USSC" or the "Commission") as an "independent commission in the judicial branch of the United States" charged with issuing and continually revising the United States Sentencing Guidelines (the "Guidelines"). 28 U.S.C. §§ 991(a)-(b), 994(b)(1). Accordingly, the Commission has a direct interest in the standards for appellate review of sentences issued in consideration of those Guidelines. The Commission previously submitted briefs in this Court as *amicus curiae* in *United States v. Booker*, 543 U.S. 220 (2005), and *Mistretta v. United States*, 488 U.S. 361 (1989).

STATEMENT

A. The Problem Of Disparity In Sentences Identified By Congress

In 1984, Congress enacted the Sentencing Reform Act (the "Act") in response to an emerging consensus that the federal sentencing system was seriously broken and in need of major repair. Before the Act, "each judge [was] left to apply his own notions of the purposes of sentencing. As a result, . . . Federal judges mete[d] out [a] . . . wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98-225, at 38 (1983). Indeed,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

"[t]he absence of Congressional guidance to the judiciary . . . all but guaranteed that . . . similarly situated offenders . . . [would] receive different sentences." H.R. Rep. No. 98-1017, at 34 (1984). Numerous studies from the pre-Guidelines era confirmed that differences among judges in sentencing philosophies caused disparity.[2]

The principal purpose of the Act was to reduce these "glaring disparities," S. Rep. No. 97-307, at 956 (1981), between "defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Congress acknowledged the necessity of "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." *Id.* But Congress principally intended the Act to effect a dramatic shift away from complete judicial discretion and toward more consistent, structured sentencing by establishing a "comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served." S. Rep. No. 98-225, at 39.

To that end, Congress limited sentencing judges to considering seven factors in imposing a sentence: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); the four purposes of punishment, *id.* § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); the applica-

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[2] *See* John S. Carroll *et al.*, *Sentencing Goals, Casual Attributions, Ideology, and Personality*, 52 J. Personality & Soc. Psychol. 107 (1987); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109, 114 (1975); Anthony Partridge & William B. Eldridge, Federal Judicial Center, *The Second Circuit Study: A Report to the Judges of the Second Circuit* 36 (1974); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment*, 33 Rutgers L. Rev. 799, 813 (1981); *see also* Kevin Clancy *et al.*, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. Crim. L. & Criminology 524 (1981).

ble Guidelines range, *id.* § 3553(a)(4); the Commission's policy statements, *id.* § 3553(a)(5); "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6); and "the need to provide restitution to the victims of the offense," *id.* § 3553(a)(7).

B. The Congressionally Directed Mission Of The Sentencing Commission

In directing the implementation of those statutory mandates, Congress created an agency within the judicial branch, to which it delegated the task of establishing a set of uniform sentencing policies and practices to be used as guidelines by judges in choosing specific sentences within the wide statutory ranges set out in Title 18 of the U.S. Code. To prevent the appearance of partisanship from affecting that process, Congress directed that "[n]ot more than four" of the Commission's seven voting members "shall be members of the same political party." 28 U.S.C. § 991(a). In keeping with the bipartisan spirit of the Act, Congress did not adopt a single philosophy of sentencing, nor did it encourage the Commission to do so. Instead, it charged the Commission with assuring that each of the four often-competing purposes of punishment – retribution, deterrence, incapacitation, and rehabilitation, *see* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b)(1)(A) – is adequately met.

Congress directed the Commission to develop sentencing ranges for specific categories of offenses involving similarly situated defendants. It specified that the maximum of a range generally should "not exceed the minimum of that range by more than the greater of 25 percent or 6 months." 28 U.S.C. § 994(b)(2). Congress fully expected that "there [would] be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98-225, at 168. Congress intended

that there "be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*

Upon implementation of the Guidelines, Congress required the Commission's work to be a continually evolving process based on experience and empirical study, producing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

C. The Range Of Factors Congress Directed The Commission To Consider

Congress directed the Commission to consider seven factors – all of which have been traditionally considered by judges in sentencing – in formulating offense categories: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. *See* 28 U.S.C. § 994(c)(1)-(7).

Congress also identified 11 offender characteristics, such as age, education, vocational skills, physical condition (including drug dependence), and family and community ties, and instructed the Commission to decide whether those characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence." *Id.* § 994(d)(1)-(11). Congress prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). It further specified that, "in recommending a term of imprisonment or length of a term of imprisonment," the Guidelines should reflect the "general inappropriateness" of considering certain other factors that might serve as proxies for forbidden factors, such as

education, vocational skills, employment record, and family and community ties. *Id.* § 994(e).

The Act provided the Commission with an extensive list of other specific instructions, often requiring the Commission to strike a balance between competing policy goals. *See id.* §§ 991(b), 994(a)-(*o*). For example, the Act directed the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." *Id.* § 994(m). At the same time, however, Congress cautioned the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." *Id.* § 994(g).

SUMMARY OF ARGUMENT

I. The courts of appeals are correct to accord a presumption of reasonableness to a Guidelines sentence because the Guidelines are the product of a comprehensive and collaborative process to implement the directives in the Sentencing Reform Act of 1984 and subsequent legislation. The Commission has faithfully carried out its legislative mandate according to procedures that are thorough and transparent. During more than 20 years of work, the Commission has amassed a considerable expertise, informed by data collected from hundreds of thousands of past sentencing decisions and extended, rigorous debate between all sectors of the criminal justice system. Applying its congressionally delegated policy judgment to the results of its continuous empirical research, the Commission has produced an evolving set of Guidelines, the application of which produces a sentence that is reasonable in relation to Congress's purposes and comports with congressional sentencing prerogatives.

Courts of appeals should presume that application of the Guidelines produces reasonable sentences. Both Congress and this Court have recognized that the Commission is to play a principal role in crafting federal sentencing policy. Presuming the reasonableness of a Guidelines sentence properly acknowledges that role. A presumption

of reasonableness on appeal does not, as petitioners suggest, reinstate a mandatory Guidelines regime. As the Commission's data show, in those circuits that have adopted a presumption of reasonableness, there has been no discernible effect on the rate at which district courts voluntarily choose to adhere to the Guidelines. Likewise, in those circuits that have declined to adopt a presumption, no increase in sentences outside the Guidelines range can be detected.

II. The arguments against a presumption of reasonableness are unpersuasive. Petitioners and their *amici* claim that Guidelines ranges do not incorporate the factors that a sentencing judge must consider in imposing a sentence under 18 U.S.C. § 3553(a). But that contention misunderstands the structure of the Sentencing Reform Act. The Act guided the Commission in integrating the purposes of sentencing into a workable sentencing structure. *See* 28 U.S.C. §§ 991, 994. As the First Circuit has recognized, the Guidelines "are the only *integration* of the *multiple* [§ 3553(a)] factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc).

ARGUMENT

I. AN APPELLATE COURT IS CORRECT TO APPLY A PRESUMPTION OF REASONABLENESS TO A SENTENCE WITHIN THE GUIDELINES

A. The Process That Produced The Guidelines Evidences The Reasonableness Of Sentences That Follow The Guidelines

In promulgating and amending the Guidelines, the Commission has diligently pursued a thorough and reasoned administrative process, designed to be collaborative and transparent. Application of the Guidelines resulting from that process produces a reasonable sentence that incorporates the purposes of sentencing that Congress articulated in the Sentencing Reform Act of 1984.

1. The Commission chose an appropriate starting point for the Guidelines framework

As it began to draft the Guidelines, the Commission chose to tap the collective expertise of federal judges. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17-18 (1988) ("Breyer, *Key Compromises*") (explaining the basis for that decision). Sentencing judges routinely balanced the competing purposes of punishment and of any mitigating and aggravating factors. By drawing averages from thousands of past sentencing decisions and examining data in tens of thousands of cases, the Commission was able to reduce disparity (the very definition of averaging), while striking a reasonable balance between the purposes of punishment. *See* USSC, *Report to Congress: Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16 (June 1987) ("Supp. Report"). That analysis allowed the Commission to discern what offense and offender characteristics tended to affect the sentencing decision, and to what extent. The Commission assigned "weights" to those relevant factors that traditionally have been considered appropriate sentencing factors, thereby guiding courts in determining how each factor should affect the calculation of the sentence. *See* USSC, *Guidelines Manual* § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)) (2006) ("USSG"); *see also* 18 U.S.C. § 3661.

2. The Commission promulgated the initial Guidelines in a transparent, collaborative process

From the outset of its work, the Commission was committed "to developing sentencing guidelines informed by the widest measure of public comment." Draft of Sentencing Guidelines, 51 Fed. Reg. 35,080 (Oct. 1, 1986) (preliminary notice). To that end, the first Commission decided that all of its regular meetings would be open to the public. *See* Meeting Policy, 51 Fed. Reg. 11,869 (Apr. 7, 1986) (notice). The Commission established advisory

and working groups, which included representatives from United States Attorneys offices, state district attorneys, federal probation officers, defense attorneys, scholars, and federal judges. *See* 51 Fed. Reg. at 35,080, 35,082. The Commission invited these groups (including three groups of federal judges) to participate in working sessions with Commission members and staff to examine early drafts of the Guidelines and to opine on the important drafting issues facing the Commission. *See id.* at 35,082-83. The Commission also obtained information from a wide array of sources, through solicitations to federal and state agencies, and in public hearings.[3] *See id.* at 35,083.[4]

After those hearings, the Commission published a preliminary draft of the Guidelines. *See* 51 Fed. Reg. at 35,080. Although not required by Congress to do so, publication provided the Commission with "a vehicle for focused critical analysis and public comment." *Id.* at 35,081. The Commission received and considered comment from hundreds of groups and individuals. *See id.* Those comments led the Commission to issue a revised draft of the Guidelines in February 1987. *See* Proposed Sentencing Guidelines and Policy Statements, 52 Fed. Reg. 3920 (Feb. 6, 1987) (notice). After a third set of

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[3] The Commission conducted a series of topical public hearings concerning the Guidelines. *See* Hearing Notices: 51 Fed. Reg. 11,869 (Apr. 7, 1986) (pertaining to offense seriousness); 51 Fed. Reg. 17,850 (May 15, 1986) (treatment of prior criminal record); 51 Fed. Reg. 19,918 (June 3, 1986) (organizational sanctions); 51 Fed. Reg. 24,781 (July 8, 1986) (sanctions other than incarceration); 51 Fed. Reg. 33,338 (Sept. 19, 1986) (plea agreements). The attendees included representatives of the executive and judicial branches of government, the defense bar, other participants in the federal criminal justice system, and public interest groups, among others. The complete list of attendees may be found in Appendix A of the Supplementary Report.

[4] The Commission also examined existing state guidelines systems, *see* Supp. Report at 14, but ultimately concluded that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes," *id.*; *see also* USSG § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)).

revisions, the Commission submitted the Guidelines and policy statements to Congress. *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (May 13, 1987) (notice). The Guidelines became effective on November 1, 1987, after a six-month period of congressional review. *See* 18 U.S.C. § 3551 note.[5]

3. The Commission continues to amend the Guidelines, subject to congressional approval, based on judicial experience and empirical study

Congress expected the Commission continually to revise the Guidelines "to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing." S. Rep. No. 98-225, at 77; *see* 28 U.S.C. § 994(*o*); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991) ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest."). The Commission recognized Congress's expectation, explaining that the Guidelines would be "refined and amended as practical experience, analysis, and logic dictate." 52 Fed. Reg. at 3921. Consistent with Congress's direction, the Commission has amended the Guidelines – 696 times, to date – in response to a variety of considerations, including court decisions, congressional directives, formal and informal input from federal judges, prosecutors, defense attorneys, probation officers, academics, and other interested groups, and the Commission's own evaluations of needed refinements. *See* USSG App. C & Supp.[6]

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[5] The Guidelines were not fully implemented until after *Mistretta v. United States*, 488 U.S. 361 (1989), in which this Court upheld the Act against a challenge that it violated the separation of powers.

[6] For example, the Commission has amended the Guidelines at least 25 times in response to circuit conflicts alone. *See* USSG App. C, amends. 484, 487, 493, 549, 577, 579, 580, 581, 582, 583, 591, 597, 602, 603, 604, 613, 614, 615, 617, 630, 632, 634, 635, 645, 660. That amendment process has been noted by this Court, and frequently

In the aftermath of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), for example, the Commission analyzed post-*Booker* cases and prepared a report to Congress on its findings. The Commission is actively looking at some of the issues raised in the report and has made addressing those issues part of its priorities for the 2006-2007 amendment cycle and beyond.[7] This evolutionary process, steadily updating the Guidelines upon the basis of empirical research, expert analysis, and congressional directives, is precisely the work of the Commission this Court identified in *Booker* as essential to "promot[ing] uniformity in the sentencing process." 543 U.S. at 263.

Data collected by the Commission have provided empirical support for congressional action as well as Commission amendments. For example, the Commission's data provided the primary impetus for Congress's enactment of the statutory safety-valve provision at 18 U.S.C. § 3553(f), which permits the imposition of a Guidelines sentence without regard to a statutory mandatory minimum sentence in certain cases. *See* H.R. Rep. No. 103-460, at 4 & n.5 (1994) (citing USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) ("*Mandatory Penalties Report*")); *see also* William W. Wilkins, Jr. & John R.

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invoked by the Solicitor General as a reason not to grant certiorari to resolve circuit conflicts on issues arising under the Guidelines. *See Braxton*, 500 U.S. at 348.

[7] For example, the Commission's *Final Report on the Impact of United States v. Booker on Federal Sentencing* (Mar. 2006) ("*Booker Final Report*") identified issues associated with criminal history as one of the top reasons for all types of below-range sentences in the post-*Booker* era. Moreover, in 2004, the Commission staff completed an empirical study on recidivism rates and first offenders, the results of which provided an additional basis for reconsideration of the Guidelines' treatment of criminal history. *See* USSC, *Recidivism and the "First Offender"* (May 2004). Accordingly, the Commission has included a review of criminal history as one of its final priorities in the 2006-2007 amendment cycle. *See* Final Priorities, 71 Fed. Reg. 56,578 (Sept. 27, 2006) (notice).

Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993) ("Wilkins, *Role of Sentencing Guideline Amendments*").[8]

In addition to its extensive data analysis, the Commission solicits input on possible amendments from stakeholders in the criminal justice system. *See* 28 U.S.C. § 994(*o*) (directing the Commission to consult "with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system"). Sentencing judges have been a particularly valuable source of information. After the Criminal Law Committee of the Judicial Conference expressed concerns to the Commission about the Guidelines' treatment of economic crimes, for example, the Commission undertook a multi-year study, including extensive field testing with federal judges and probation officers of a new proposed loss definition. Based on that research, the Commission consolidated the theft and fraud guidelines, and promulgated a new common loss table. *See* USSC, *A Field Test of*

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[8] The Commission's use of sentencing data is evidenced in many of its "Reasons for Amendment[s]," explanations that accompany each amendment to the Guidelines. *See, e.g.*, USSG App. C, amends. 374, 450, 531, 555, 592, 596, 597, 624, 648, 652, 663, 678. Commission reports and working papers are also replete with examples of the Commission's use of sentencing data. *See, e.g.*, USSC, *Report to Congress: Increased Penalties under the Sarbanes-Oxley Act of 2002* (Jan. 2003); USSC, *Report to Congress: Adequacy of Federal Sentencing Guidelines Penalties for Computer Fraud and Vandalism Offenses* (June 1996); USSC, *Intellectual Property Amendments: 2006 Policy Development Team Report* (May 2006); USSC, *2006 Steroids Report* (Mar. 2006).

The Commission also uses the data to (1) provide prison impact assessments to Congress as required under 18 U.S.C. § 4047; (2) "publish data concerning the sentencing process"; and (3) "collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a)." 28 U.S.C. § 995(a)(14), (15). Examples of such publications include USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) ("*Fifteen-Year Report*"), and *Booker Final Report*.

Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission (Oct. 1998). Similarly, the 2001 amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) was prompted by "concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border." USSG App. C, amend. 632.

When the Commission acts upon that information, it employs a transparent amendment process. Each year, the Commission publishes a notice of possible policy priorities for the regular amendment cycle, seeking public comments. *See, e.g.*, Sentencing Guidelines for United States Courts, 71 Fed. Reg. 44,344 (Aug. 4, 2006) (notice). After reviewing public comments, the Commission votes on the priorities and publishes a notice of final priorities. *See, e.g.*, 71 Fed. Reg. at 56,578. It then engages in an open process, with public hearings and comment, before promulgating amendments. *See, e.g.*, Proposed Amendments, 71 Fed. Reg. 4782 (Jan. 27, 2006) (notice; request for public comment; notice of public hearings); *see also* USSC Rules of Practice and Procedure 3.4, 4.3, 4.4, 4.5; 28 U.S.C. § 994(p) (specifying 180-day congressional review period).

Congress has not hesitated either to disapprove of Commission decisions with which it does not agree[9] or to direct the Commission to take action on matters it deems important.[10] On the whole, however, Congress has time and again approved the Guidelines and the numerous amendments to them, reaffirming its confidence in the Commission as its delegate in crafting sentencing policy.

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[9] *See, e.g.*, Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (disapproving a Guidelines amendment that would have equalized the Guidelines penalties for powder cocaine and crack cocaine offenses based solely upon drug quantity).

[10] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 905, 116 Stat. 745, 805-06 (directing the Commission to make various changes to the Guidelines, including increasing penalties for offenders who commit corporate crimes).

See United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005) ("[t]he Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses"). Based as they are on analysis from hundreds of thousands of cases and years of expert study, the Guidelines ranges represent reasonable choices that comport with congressional purposes in the Act and subsequent legislative directives.

B. An Appellate Court's Presumption That A Sentence Within The Guidelines Range Is Reasonable Gives Appropriate Recognition To Congress's Intent For The Commission To Play A Continuing Role In Federal Sentencing

1. When a district court concludes with respect to a particular defendant that the Guidelines adequately account for all of the legally relevant sentencing factors and that the defendant fits well into a Guidelines category – and therefore ought to be treated like other offenders falling within that category – the court of appeals should presume that the resulting sentence is reasonable. Application of a presumption of reasonableness to a sentence within the Guidelines range recognizes the Commission's extensive efforts to produce a rational sentencing system that incorporates the collective knowledge and experience of all of the participants in the criminal justice system, just as Congress intended. A sentencing judge, utilizing the Guidelines, is significantly better able to marshal all of that systemic information in arriving at a reasonable (and reasonably uniform) outcome. Following the Guidelines provides the benefit of the Commission's thorough process and produces regularized sentencing outcomes, thus fulfilling Congress's central purpose of reducing unwarranted disparity.

Because the Commission was charged with striking an appropriate balance between numerous competing policy goals, taking into account the views of opposing forces in the criminal justice system, the Guidelines inevitably represent a set of compromises. As with all compromises,

some stakeholders may have been left with the sense that the Guidelines are not perfect. But, as the original Commissioners learned, in sentencing policy, the perfect can be the enemy of the good. *See* Breyer, *Key Compromises* at 2, 8-12. Recognizing that a proper application of the Guidelines produces a "reasonable" sentence merely acknowledges that reasonableness is by definition a rough assessment of shared wisdom.

2. Presuming the reasonableness of a Guidelines sentence is consistent with *Booker*. In researching sentencing practices and refining the Guidelines, the Commission performs precisely the role that this Court envisioned for it in *Booker*. *Booker* severed only two subsections of the Act,[11] leaving in place the remainder of the sentencing system Congress devised[12] – a system in which the Guidelines play the central role. *See* 543 U.S. at 245. This Court explained that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further [congressional] objectives." *Id.* at 264.

In particular, the Court stated that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Id.* Thus, the Court validated the Commission's continued research and policymaking roles in carrying into effect Congress's primary goal of avoiding unwarranted disparity: "The Sentencing Commission will continue to collect and study appellate court decision-making. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." *Id.* at 263.

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[11] The standard of review contained in 18 U.S.C. § 3742(e) was one of the provisions of the Act struck down in *Booker*. *See* 543 U.S. at 245. The other was 18 U.S.C. § 3553(b), which made the Guidelines mandatory. *See id.*

[12] *See* 18 U.S.C. §§ 3551 *et seq.*; 28 U.S.C. §§ 991-998.

3. Contending that a Guidelines sentence is a reasonable sentence does not imply that a sentence outside the Guidelines range can never be reasonable. The Commission acknowledges that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to the sentencing decision." USSG § 1A1.1 cmt. background. Moreover, under § 3553(a), "sentencing decisions must be done case by case and must be grounded in case-specific considerations." *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006).[13]

C. Sentencing Data Show That According A Presumption Of Reasonableness To A Guidelines Sentence Does Not Frustrate Judicial Discretion

1. Petitioners argue that, when courts of appeals presume that Guidelines sentences are reasonable, district judges feel an irresistible pressure to follow the Guidelines, such that, even when judges view a non-Guidelines sentence as appropriate, they will select a within-Guidelines sentence for fear of being reversed on appeal. *See, e.g.*, Rita Pet. Br. 28 (arguing that "presumption . . . discourages courts from considering . . . information about the particular individual before the court"). Thus, petitioners claim, an appellate presumption of reasonableness renders the Guidelines effectively mandatory, in

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[13] Indeed, the Commission recommends that district judges follow a three-step process in sentencing after *Booker*: (1) calculate the Guidelines range; (2) consider the policy statements and the appropriateness of any departures from the applicable range; and (3) then consider whether a variance pursuant to § 3553(a) is appropriate. *See Booker Final Report* at 42. This process essentially is codified in the amended Statement of Reasons form issued by the Judicial Conference and approved by the Commission, which sentencing courts are statutorily required to use. *See* AO 245B (Rev. 06/05); 28 U.S.C. § 994(w)(1)(B) (as amended by the Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, Tit. VII, § 735(1), 120 Stat. 192, 271); *see also* proposed amended Fed. R. Crim. P. 11(b)(1)(M) (stating court's obligation "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)").

violation of *Booker*. But the Commission's data refute that argument.

If petitioners' theory were correct, one would expect to see over time a significant and widening gap between the rate of below-Guidelines sentences in circuits with a presumption of reasonableness and the rate of such sentences in circuits without a presumption. On the contrary, the rate at which sentencing judges impose a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure in circuits that apply a presumption of reasonableness (87.5 percent) is quite close to the rate (83.9 percent) in circuits that apply no presumption. *See* App. 1a. And the difference in those rates has remained virtually unchanged since those circuits adopted the respective presumption rules. Even when the data are broken down by individual circuit, no meaningful trends are observable. *See* App. 2a-13a. Therefore, the empirical evidence, namely post-*Booker* rates of both departures and variances from the Guidelines sentence, demonstrates that applying an appellate presumption of reasonableness does not deter sentencing judges from exercising their discretion to impose a sentence outside of the applicable Guidelines range.

2. In 86 percent of all sentences handed down since *Booker*, judges have chosen a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure. This post-*Booker* figure simply reflects the satisfaction with the Guidelines that sentencing judges expressed to the Commission before *Booker*. According to an extensive pre-*Booker* survey undertaken by the Commission, judges generally agreed that the Guidelines provide punishment levels that reflected the seriousness of the offense (18 U.S.C. § 3553(a)(2)(A)); afforded adequate deterrence to criminal conduct (*id.* § 3553(a)(2)(B)); protected the public from further crimes of the defendant (*id.* § 3553(a)(2)(C)); and avoided unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (*id.* § 3553(a)(6)). *See* Linda Drazga

Maxfield, USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* I-1 & Apps. A, C (Mar. 2003). Thus, sentencing judges – who are the best authorities on the propriety of the Guidelines – told the Commission that, in most cases, the Guidelines range provided a reasonable sentence.

II. THE GUIDELINES RANGES INCORPORATE THE STATUTORY FACTORS THAT A SENTENCING JUDGE CONSIDERS IN IMPOSING A SENTENCE

Petitioners and their *amici* principally contend that Guidelines sentences should not be presumed reasonable because the Guidelines do not take into account the factors that, under 18 U.S.C. § 3553(a), a sentencing judge must consider in imposing a sentence. *See, e.g.*, National Association of Criminal Defense Lawyers ("NACDL") *Amicus* Br. 12-21. That claim misunderstands the Commission's practice and the Act, which directed the Commission to consider facts that encompass the § 3553(a) factors. *See* 28 U.S.C. §§ 991, 994. As it was instructed to do by Congress, the Commission has carefully considered the § 3553(a) factors in creating categories of common offense and offender characteristics, including various mitigating and aggravating circumstances.

A. The Guidelines Produce A Sentence That Is Sufficient, But Not Greater Than Necessary, To Carry Out The Purposes Of Sentencing

Section 3553(a) directs district courts to choose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing identified in the Act. Petitioners contend that, contrary to that directive, which is referred to as the "parsimony" provision, the Guidelines often recommend sentences greater than necessary to satisfy the statutory purposes of sentencing.

Petitioners are incorrect. The *Guidelines Manual* instructs sentencing courts to consider § 3553(a) when selecting a specific sentence within the Guidelines range. *See* USSG Ch. 5 intro. cmt. In more than 40 percent of

post-*Booker* cases sentenced within the applicable range, the sentencing court has selected a sentence *above* the minimum of the range, demonstrating that the low end of the range was not sufficient to meet the statutory purposes of sentencing. *See* USSC, *2005 Sourcebook of Federal Sentencing Statistics* 298 (2006); USSC, *Preliminary Quarterly Data Report* 38 (Dec. 2006).

In addition, Congress had the opportunity to disapprove every provision of the current Guidelines. It cannot be presumed that Congress permitted those provisions to take effect despite a belief that they were inconsistent with Congress's statutory directive in § 3553(a).

More fundamentally, petitioners' claim is inherently subjective. One cannot sensibly evaluate compliance with the parsimony provision without first making a judgment about what punishment is "necessary" and "sufficient." On that score, there will always be room for good-faith disagreements among reasonable people as to what sentence is appropriate for particular offenses and offenders.

Recognizing the Commission's role as a primary sentencing policymaker consistent with congressional intent, petitioners seek to support their reliance on the parsimony provision by citing Commission statements disagreeing with congressional mandates, such as mandatory minimum sentences and the disparity between sentences for powder cocaine and crack cocaine (the crack/powder ratio). *See* Rita Pet. Br. 36-37 (citing *Fifteen-Year Report* at 135). But the Commission and sentencing judges (like the petitioners) must abide by the will of Congress, even when they might prefer a different policy outcome. *Cf. United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006) ("[A]llowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress."). It cannot be the case that a sentence is unreasonably high under

Congress's parsimony provision when Congress itself elsewhere made the choice for severity.[14]

B. The Guidelines Ranges Appropriately Consider The Nature And Circumstances Of The Offense

Section 3553(a)(1) requires sentencing judges to consider "the nature and circumstances of the offense." Congress directed the Commission to consider substantively equivalent factors in forming the Guidelines – namely, the aggravating and mitigating circumstances of the crime and the nature and degree of the harm caused by the crime. *See* 28 U.S.C. § 994(c)(1)-(3). Congress intended the sentencing judge to consider "such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstance surrounding the offense." S. Rep. No. 98-225, at 75. The Commission incorporated those same considerations into the Guidelines. *See generally* USSG §§ 2B1.1, 2K2.4, 3B1.1, 3B1.2.

Petitioners contend, however, that only the sentencing judge can appropriately consider the nature and circumstances of the particular offense at issue. They claim that the Guidelines are a mechanical, arithmetic exercise, the product of which is insufficiently sensitive to the individual case. *See* Rita Pet. Br. 10. But that criticism misunderstands the Guidelines. Application of the Guidelines involves discretionary determinations by the district judge at every turn. For example, USSG § 3B1.2 requires the district court to consider the defendant's "role in the

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[14] In seeking to assure that sentences are no higher than necessary, the Commission has at times sought to persuade Congress to adopt less severe penalties, with some success. For example, the Commission has long opposed mandatory minimum penalties for drug trafficking offenses. Relying on its empirical research, Congress responded to the Commission's recommendation by passing the "safety valve" provision, by which offenders with a minimal criminal history can escape the mandatory minimum if they meet certain criteria. *See* USSG § 5C1.2.

offense," which includes mitigation of, enhancement of, or no change to the offense level.[15] The Guidelines are replete with instances in which the district court must assess the nature and circumstances of the offense and the offender.

Amicus New York Council of Defense Lawyers ("NYCDL") contends that the Guidelines place disproportionate emphasis on drug quantity to the exclusion of other relevant factors. *See* NYCDL Br. 10 (*Claiborne*, No. 06-5618). But, as the *Fifteen-Year Report* explains, while the Commission was drafting the original Guidelines, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"), including stiff 5- and 10-year mandatory minimum penalties keyed to specific drug quantities. To avoid so-called sentencing "cliffs," where a trivial change in quantity has a dramatic effect on the sentence, the Commission chose to "link the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences." *Fifteen-Year Report* at 49. Had the Commission "given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization," *id.*, as NYCDL urges (at 20-21 (*Rita*, No. 06-5754)), then sentences under the Guidelines would not have reflected the seriousness of the offense as determined by Congress's mandatory minimum sentences.

C. In Keeping With The Directives Of The Act, The Guidelines Account For The History And Characteristics Of The Defendant

Section 3553(a)(1) also directs the court to consider the "history and characteristics of the defendant." Petitioners

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[15] The mitigating role adjustments, for example, leave it to the district court to decide whether that role was "minimal" (in which case the offense level is reduced by four levels) or "minor" (warranting a reduction of only two levels). Moreover, a difference of up to four levels has no small effect on the sentence: the Guidelines range for an offender with no criminal history and an offense level of 16 would be 21-27 months; reducing the offense level to 12 would potentially cut the sentence in half, with a range of 10-16 months.

argue (Rita Pet. Br. 20-21; Claiborne Pet. Br. 20) that the Commission failed sufficiently to integrate that factor into the Guidelines because it prohibited or discouraged consideration of certain individual characteristics that petitioners assert are relevant to the sentencing determination. They cite examples such as include age, marital status, gender, employment, and family ties. Petitioners and their *amici* fail to consider the context of the Act as a whole and the congressional concerns that led to its passage.

1. Congress feared that the evident disparities in sentencing resulted from discrimination. The Act accordingly directed the Commission to "assure that the guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). And the legislative history made it "absolutely clear" that it would be inappropriate to "afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." S. Rep. No. 98-225, at 171. Thus, the Commission understood that "the imposition of different sentences based on such factors as race, sex, national origin, creed, or socio-economic status, on defendants with similar records who have been found guilty of similar conduct, constitutes a form of unwarranted disparity." William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim. L.F. 355, 368 (1991).

Implementing Congress's command, the Commission endeavored "to ensure that other considerations, possibly associated with a defendant's race or personal status, are not used to 'camouflage' the improper use of those factors as to which the statute mandates neutrality." *Id.* at 371. Thus, the Commission decided to prohibit or discourage consideration of certain other offender characteristics, such as "lack of youthful guidance." *See* Wilkins, *Role of Sentencing Guideline Amendments* at 83-85. That

decision was reasonably calculated to reduce unwarranted disparity and to balance the competing purposes of sentencing in § 3553(a)(2).

In addition to those prohibited considerations, Congress specifically discouraged consideration of several of the other offender characteristics about which petitioners complain, instructing the Commission that the Guidelines should "reflect the general inappropriateness" of considering "education, vocational skills, employment record, family ties and responsibilities, and community ties," in determining whether or for how long a defendant should be imprisoned. 28 U.S.C. § 994(e).

As a matter of construction, Congress likely did not mean to *require* the sentencing judge under § 3553(a) to consider offender characteristics that it elsewhere in the Act discouraged the Commission from incorporating into the Guidelines ranges. Although the directives in § 994 are aimed principally at the Commission, judges, who are familiar with principles of statutory interpretation, do not act unreasonably in concluding that, where § 3553(a) says "history and characteristics of the defendant," that phrase should not be read to include such characteristics as are declared elsewhere in the Act to be "general[ly] inappropriate[]" considerations. *See, e.g., Simpson v. United States*, 435 U.S. 6, 15 (1978) ("more specific" statutory provision must be given "precedence" over "general" provision).

2. Even putting aside Congress's specific instructions to the Commission about which offender characteristics to consider, Congress generally delegated to the Commission the job of choosing, on a uniform basis, those offender characteristics that should be considered in the sentencing decision, and to what extent. Listing 11 specific factors, Congress charged the Commission with deciding "whether [these] matters, *among others*, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and [the Commission] shall take them into account only to

the extent they do have relevance." 28 U.S.C. § 994(d) (emphasis added).

The Commission has carried out that command. It has found some factors appropriate to consider (*e.g.*, role in the offense, criminal history)[16] and others not (*e.g.*, drug dependence, employment record). Because Congress expressly entrusted such questions to the Commission, it is presumptively reasonable for a district court to follow the Commission's decisions.

3. Petitioners assert that certain of the offender characteristics excluded from the Guidelines, such as age in particular, may be predictive of recidivism and therefore must be considered by the sentencing judge under § 3553(a), because one of the purposes of sentencing listed there is "protect[ing] the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). But addressing recidivism is only *one* of the statutory purposes of sentencing. The Guidelines were designed to balance all four (often competing) statutory purposes of sentencing in § 3553(a)(2), and the Guidelines' treatment of criminal history accordingly reflects not only the risk of recidivism, but also the culpability of the offender. *See* Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192, 1997 WL 725695, at *3 (Jan./Feb. 1997) ("[T]he Sentencing Commission determined that it would only include factors that could be supported by both a just dessert and predictive rationale.").

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[16] Other offender characteristics determined by the Commission to be relevant to the purposes of sentencing – including abuse of a position of trust or use of a special skill in committing the offense, obstructing the administration of justice, and acceptance of personal responsibility for the criminal conduct – are factored into the applicable Guidelines range. *See* USSG §§ 3B1.3, 3C1.1, 3E1.1. Thus, the Commission has considered and incorporated relevant characteristics of the defendant into the Guidelines. Moreover, judges have always been free to consider other non-discriminatory offender characteristics in choosing a specific sentence *within* the Guidelines range.

Accordingly, instead of independently considering age (which has no bearing on culpability), the Commission decided to adopt a "decay" factor in its criminal history guideline. *See* USSG § 4A1.2(d)-(e). It determined that, the older a prior conviction, the less that conviction would raise an offender's criminal history score. Thus, prior convictions committed before a defendant reached 18 years old are treated less severely than offenses committed as an adult; a prior conviction for which a defendant received a sentence of less than 13 months of imprisonment is not considered if it is more than 10 years old; and prior convictions for which a defendant received a longer sentence are not considered when the defendant was released more than 15 years before the instant offense. *See id.* That approach accounts for the lower rate of recidivism among older offenders, while ensuring that older offenders with recent convictions are given a sentence that reflects their greater culpability.

D. The Guidelines Appropriately Balance The Statutory Purposes Of Punishment

Section 3553(a)(2) requires the sentencing judge to consider four purposes of punishment. *Amicus* NACDL contends (at 4-5, 14) that the Commission's failure to adopt any unifying philosophy of sentencing supports an inference that the Commission somehow gave up on considering the purposes of punishment. On the contrary, the Guidelines' failure to adopt a single "philosophy" of punishment is consistent with Congress's direction that the Guidelines account for all four purposes of punishment: "It should be clear that the Commission never made a commitment to choose a particular rationale, because such a commitment would be inconsistent with the statutory mandate of multiple purposes." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 917 (1990) ("Nagel, *Structuring Sentencing Discretion*").[17]

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[17] *See also* William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571, 586

Moreover, the Commission has explained how it has taken the statutory purposes of punishment into account in formulating the Guidelines. For example, under § 3553(a)(2)(A), a sentence should "reflect the seriousness of the offense"; "promote respect for the law"; and "provide just punishment for the offense." To that end, the Guidelines assign each crime a score as a starting point in assessing the seriousness of the offense. *See Fifteen-Year Report* at 12. That score is then increased or decreased to account for the harm caused by the offense and the culpability of the offender. *See id.* at 13. The Commission "has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses." *Id.*

In short, the Commission has continually measured its policies against the purposes of punishment. For example, the *Guidelines Manual* addresses how the criminal history rules are designed to address all four purposes of punishment. *See* USSG Ch. 4 intro. cmt.; *id.*, App. C, amend. 617 (increasing penalties in high-level fraud offenses because of the seriousness of offender culpability, but decreasing sentences for lower-level frauds to enhance the likelihood that the defendant will provide restitution).[18]

(1992) ("The guidelines strike an appropriate balance between the[] competing concerns [reflected in the four purposes of sentencing] in attempting to achieve the ends Congress envisioned in establishing the Sentencing Commission.").

[18] Other official Commission publications reflect that the Commission remains cognizant of its obligation to consider the four purposes of sentencing when promulgating guidelines. *See, e.g., Mandatory Penalties Report* at 18 ("The [Commission] will use its substantial research authority to examine the effects of sentencing guidelines on the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), and such topics as deterrence, recidivism, and selective incapacitation.") (footnotes omitted); *Fifteen-Year Report* at 12-13 (discussing how the Guidelines reflect the statutory purposes of punishment).

E. The Guidelines Reflect The Kinds Of Sentences Available

Section 3553(a)(3) instructs the sentencing court to consider the kinds of sentences available. Congress was concerned that "prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing." S. Rep. No. 98-225, at 77. Of equal concern to Congress, however, was the likelihood that "some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses." *Id.*; *see also* 28 U.S.C. § 994(m).

In producing the Guidelines, the Commission considered the kinds of sentences available. Its staff traveled across the Nation to obtain information and advice from states and communities in which a variety of sentencing options other than imprisonment were being used. *See supra* pp. 7-9. The Commission incorporated its consideration of the kinds of sentences available into the Sentencing Table directly, by the creation of Zones A through D. *See* USSG Ch. 5, Pt. A. Specifically, a court may sentence offenders in Zone A to probation only or to probation with various confinement conditions, such as intermittent confinement, community confinement, or home detention. For offenders in Zone B, some type of confinement condition is recommended, but it may be entirely intermittent, community, or home confinement accompanied by probation. By contrast, for offenders in Zone D, a term of imprisonment equal at least to the minimum of the Guidelines range is recommended. That incremental escalation of penalties based on offense level and criminal history is an entirely reasonable implementation of Congress's directive to consider the types of sentences available.

F. The Guidelines Reduce Unwarranted Sentencing Disparities

Section 3553(a)(6) instructs the sentencing judge to consider "the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct." Congress directed the Commission to consider the same factor. *See* 28 U.S.C. § 991(b)(1)(B). Petitioners and their *amici* argue, however, that the Guidelines do not sufficiently reduce disparity in sentences.

1. The best empirical evidence from the pre-*Booker* era refutes that claim. A "convergence of findings by researchers both inside and outside the Commission" showed that the Guidelines had reduced judge-created disparity: "The conclusion is clear: the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion." *Fifteen-Year Report* at 99 (citing Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239 (1999), and James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & Econ. 271 (1999)).

2. In focusing on disparities like the crack/powder ratio, petitioners misapprehend the intended purpose of § 3553(a)(6), which was to reduce *unwarranted* disparity. Critically, the crack/powder disparity was established by *Congress*. The unwarranted disparity of which Congress spoke in § 3553(a)(6) was not *congressionally mandated* disparity, such as crack/powder disparity, or disparity created by congressionally mandated "fast track" programs (*see* USSG § 5K3.1), but rather the disparities that arose between and among individual sentencing judges.

Congress defined unwarranted sentencing disparity in the Act: "defendants with *similar criminal records* found guilty of *similar criminal conduct* receiv[ing] *dissimilar* sentences." II USSC, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 269 (Dec. 1991) ("*1991 Report*") (citing 28 U.S.C.

§ 991(b)(1)(B)). Congress was particularly concerned about the disparity created when "judges sentence on the basis of their personal criminal philosophies and assign different weights to such factors as a defendant's criminal history, role in the offense and use of a weapon." *Id.* at 273. "[T]he disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant's race, sex, or social class." Nagel, *Structuring Sentencing Discretion* at 883-84; *see id.* at 884 ("For a system claiming equal justice for all, disparity was an inexplicable, yet constant source of embarrassment.").

Just as Congress has mandated different sentences for different types of cocaine, it has imposed mandatory-minimum penalties for certain offenses.[19] Thus, in certain cases, Congress has mandated disparate treatment of offenders with similar criminal records who engage in seemingly similar criminal conduct. But, when "[d]isparity . . . [has been] deliberately created by [Congress] for public policy reasons," II *1991 Report* at 273, that disparity cannot be considered *unwarranted* within the meaning of § 3553(a)(6). When sentencing a defendant, the judge's consideration of unwarranted disparity under § 3553(a)(6) should be limited to the disparity defined by Congress in the Act. Defendants with similar criminal records found guilty of similar criminal conduct should

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[19] The Commission does not necessarily share Congress's policy preferences. The Commission has long opposed mandatory minimum sentences and has counseled Congress that the requirement of such penalties undercuts the goals of the Act. *See Mandatory Penalties Report* at 33-34. The Commission has also repeatedly recommended to Congress that it change the current cocaine sentencing scheme. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (as directed by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796); USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997) (as directed by Pub. L. No. 104-38); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002). The Commission's work in this area continues during the current amendment cycle.

receive similar sentences, except when (as in the case of crack/powder) Congress has provided otherwise.

3. NYCDL argues (at 19-20 (*Rita*, No. 06-5754)) that the Guidelines do not adequately address the need to reduce regional disparity. NYCDL bases this argument on a mischaracterization of the Commission staff's *Fifteen-Year Report*. Although the *Fifteen-Year Report* acknowledges that regional disparities exist, the report explains that those disparities often resulted from *circumvention* of the Guidelines at the pre-sentencing stages. *See Fifteen-Year Report* at 88-89. To the extent that the disparity that NYCDL identifies results from a failure to follow the Guidelines, it provides no basis for concluding that Guidelines sentences are not presumptively reasonable.

Even the "most troubling" evidence of regional disparity noted in the *Fifteen-Year Report* – namely, that the impact of the offender's city on his sentence had increased since the implementation of the Guidelines, *see id.* at 98 – cannot readily be ascribed to the Guidelines. The studies that identified the correlation between city and sentence coincided with another major policy shift. In the ADAA, Congress – and in turn the Commission – placed a far greater emphasis on drug quantity in determining the sentence. *See* 21 U.S.C. § 841(b). Because drug cases "are not randomly assigned to cities," Congress's emphasis on quantity risked creating "greater disparity between small cities and large cities, which are distribution centers for larger quantities." *Id.*

In any event, most regional disparities result from the exercise of prosecutorial discretion, for reasons that are readily understandable. A drug bust recovering 20 pounds of marijuana may grab prosecutors' attention in rural South Carolina, whereas in Brooklyn the case may not be treated as extraordinary. Even once charges are brought, the plea bargaining process presents ample opportunity to avoid the Guidelines' goal of "real offense"

sentencing by permitting compromises on facts such as drug quantity or amount of loss.[20]

In response, the Commission has recommended that judges accept only those pleas that "adequately reflect the seriousness of the actual offense behavior . . . [such that] accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." USSG § 6B1.2(a). And the Guidelines' "relevant conduct" rule provides that all of the defendant's acts or omissions in the same course of criminal conduct be considered, regardless of whether such conduct is charged. *Id.* § 1B1.3. Yet these policy levers have their limits. Judges may often be willing to accept plea agreements to move their docket along, and appeals from such cases are rarely taken. Although the pre-sentence report contains an independent investigation of the facts surrounding an offense, ultimately judges may be reluctant to second-guess the government's view of what charges it could readily prove at trial. Thus, to the extent those disparities are unwarranted, the Commission has taken reasonable measures within its power to reduce them.

CONCLUSION

For the foregoing reasons, an appellate court's according of a presumption of reasonableness to a Guidelines sentence is consistent with *Booker*. After *Booker* severed the standard of review in 18 U.S.C. § 3742(e), courts of appeals correctly accord such a presumption.

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[20] As the Commission has noted, mandatory minimum penalties exacerbate the effects of charge bargaining on sentence disparity because the charge itself dictates the penalty. *See Fifteen-Year Report* at 90-91. For example, 18 U.S.C. § 924(c), which punishes the use of a firearm in furtherance of a drug trafficking offense, carries a mandatory minimum five-year term, to run *consecutively to* the sentence for the underlying offense. Not surprisingly, § 924(c) counts raise the potential for disparity between prosecutors who frequently charge and bargain them away and those who do not. But that disparity, which results from the choices of Congress and prosecutors, cannot be considered *unwarranted* disparity within the meaning of § 3553(a)(6).

Respectfully submitted,

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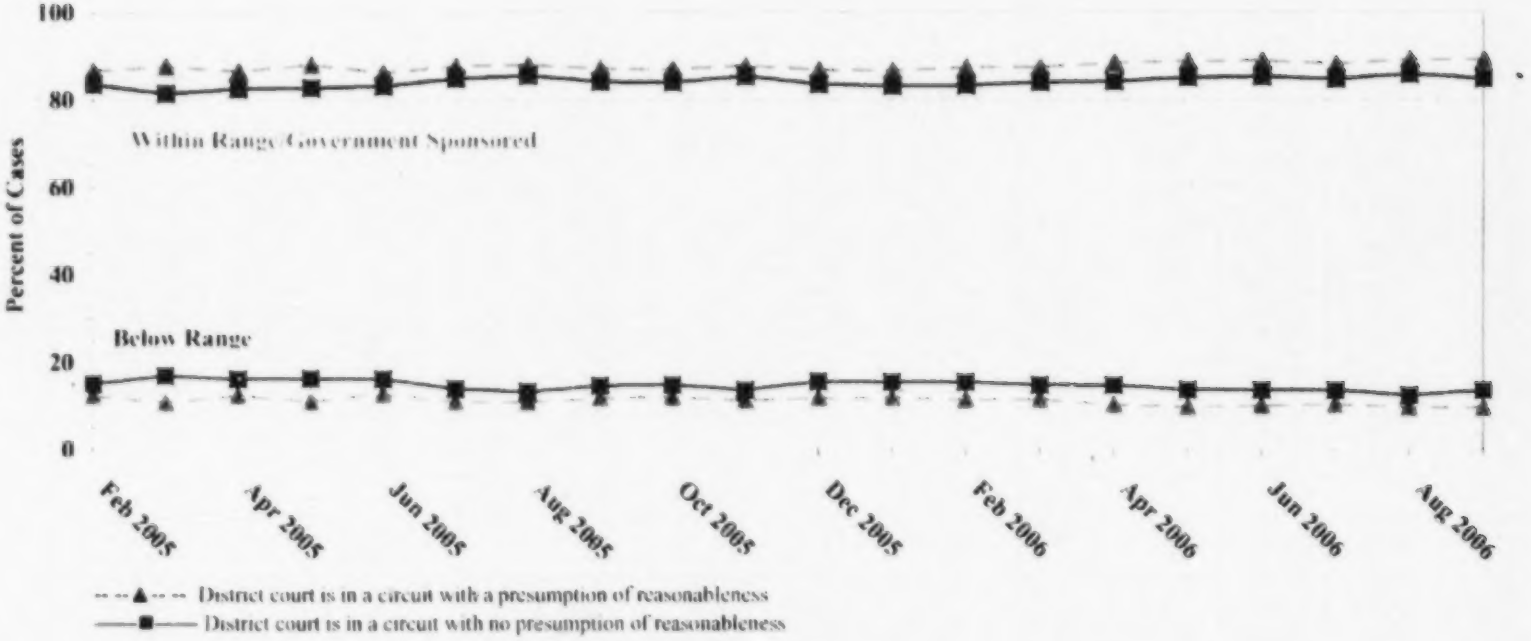
January 22, 2007

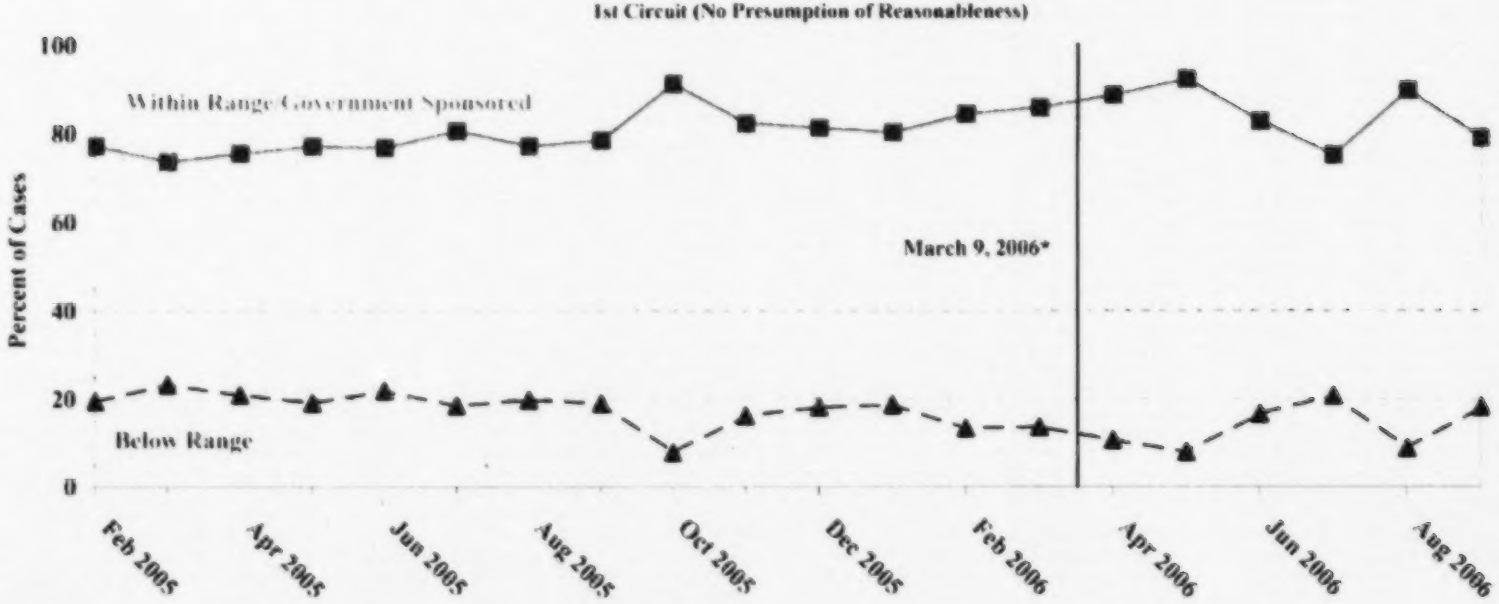
APPENDIX

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT AGGREGATED BY CIRCUIT DECISION
(February 1, 2005, through September 30, 2006)



SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT (February 1, 2005, through September 30, 2006)



**United States v. Jiménez-Beltre*, 440 F.3d 514 (1st Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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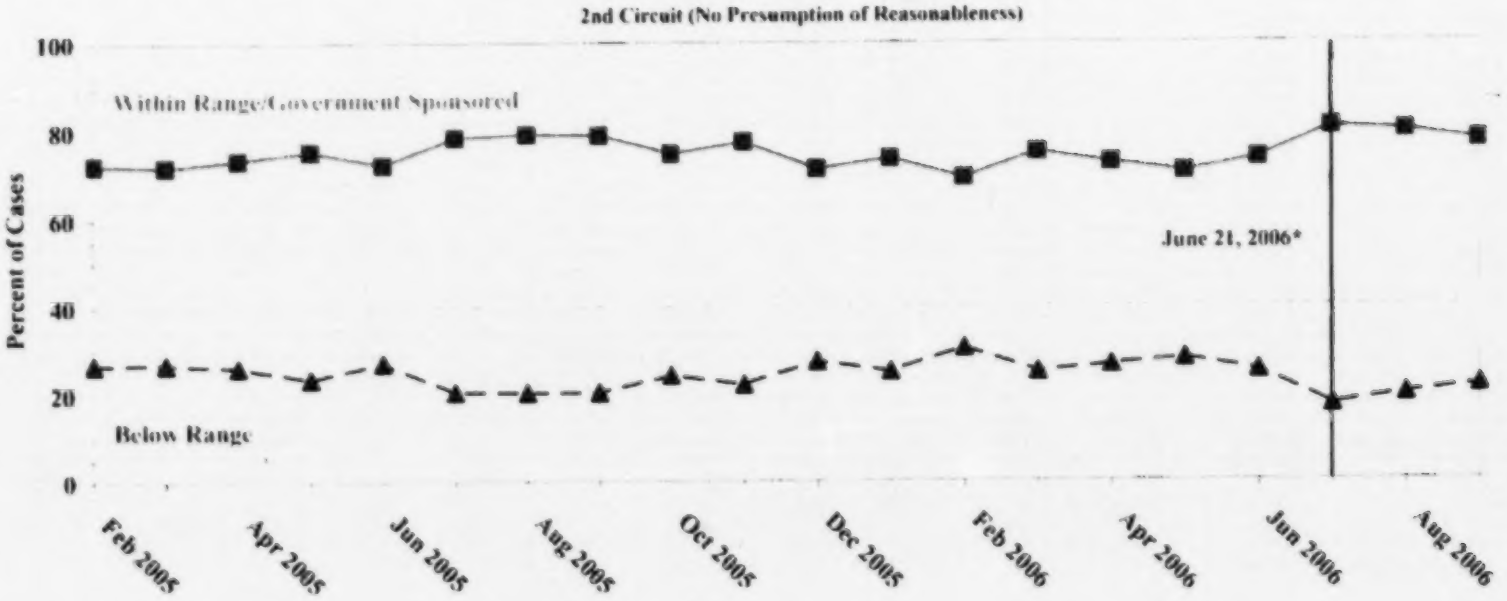
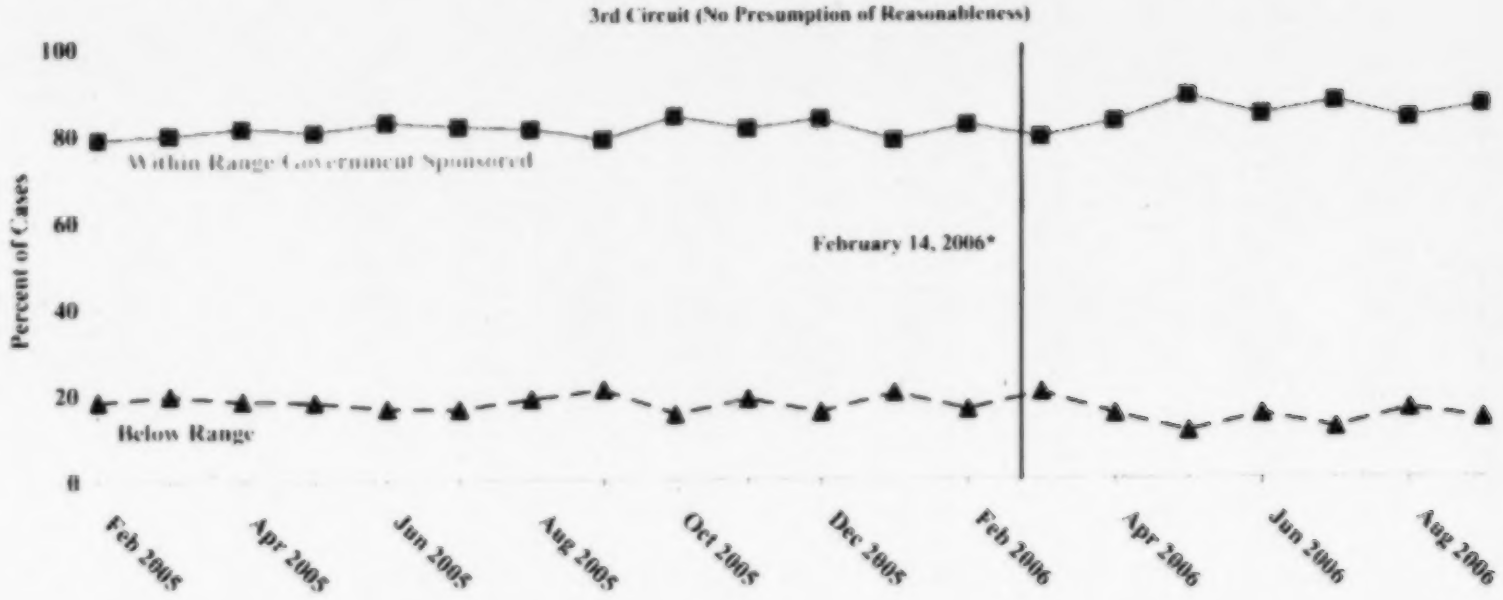
(February 1, 2005, through September 30, 2006)



**United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Cooper*, 437 F.3d 324 (3rd Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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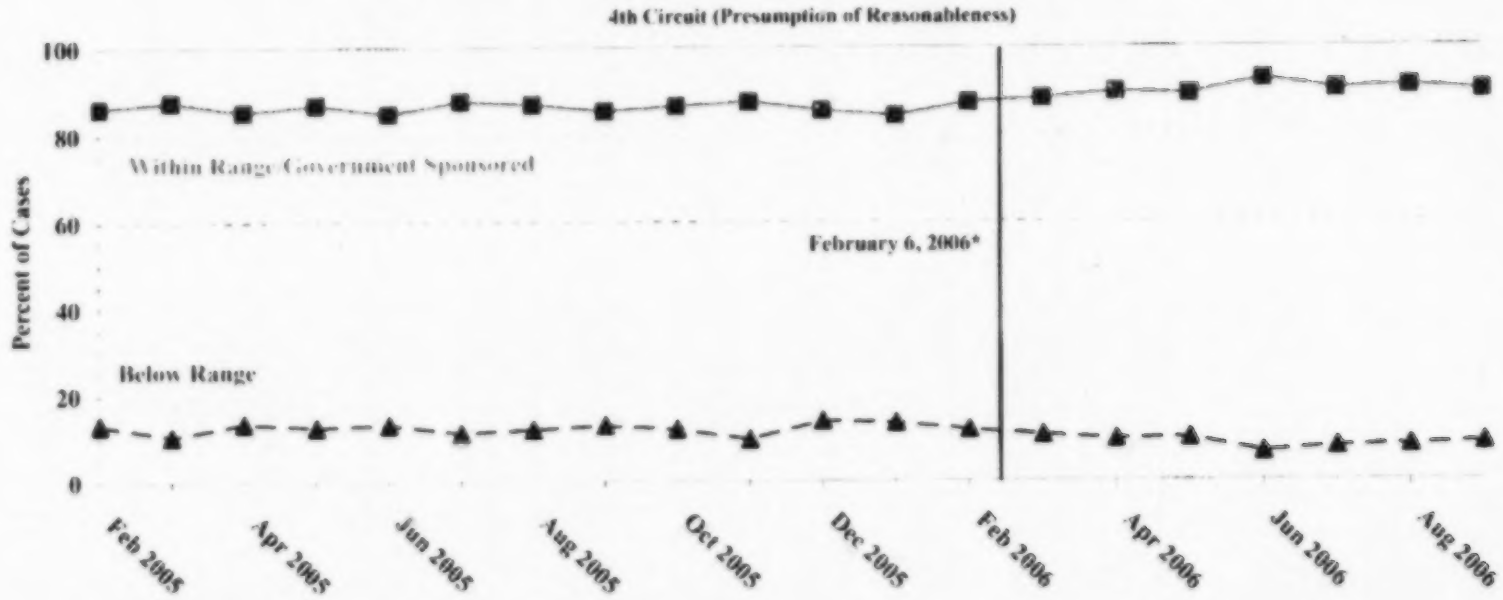
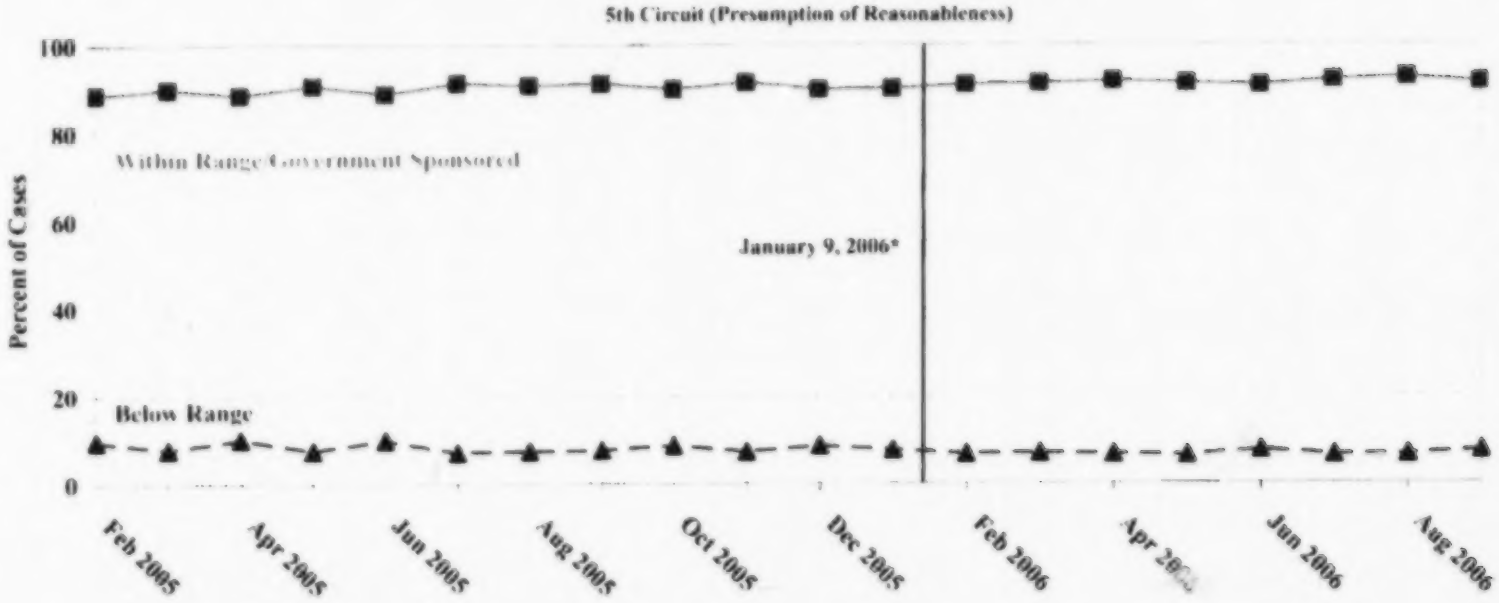
(February 1, 2005, through September 30, 2006)



**United States v. Green*, 436 F.3d 449 (4th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Alonzo*, 435 F.3d 551 (5th Cir.2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
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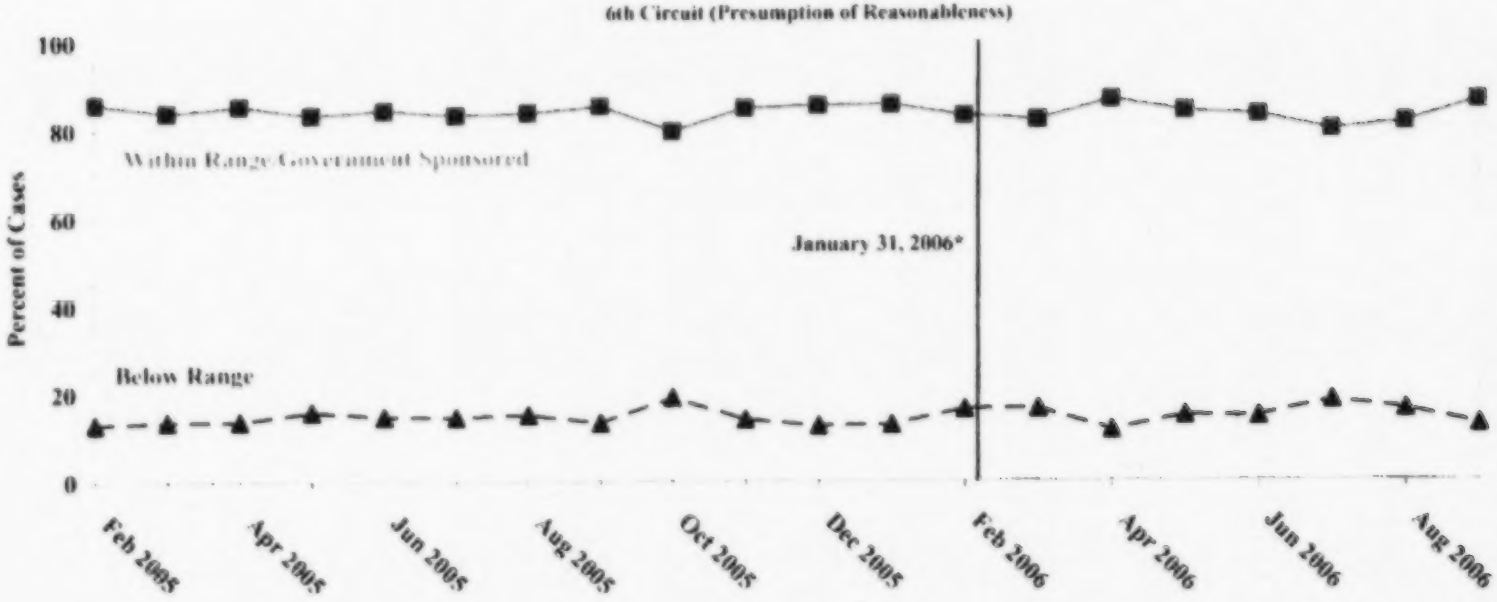

**United States v. Williams*, 436 F.3d 706 (6th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

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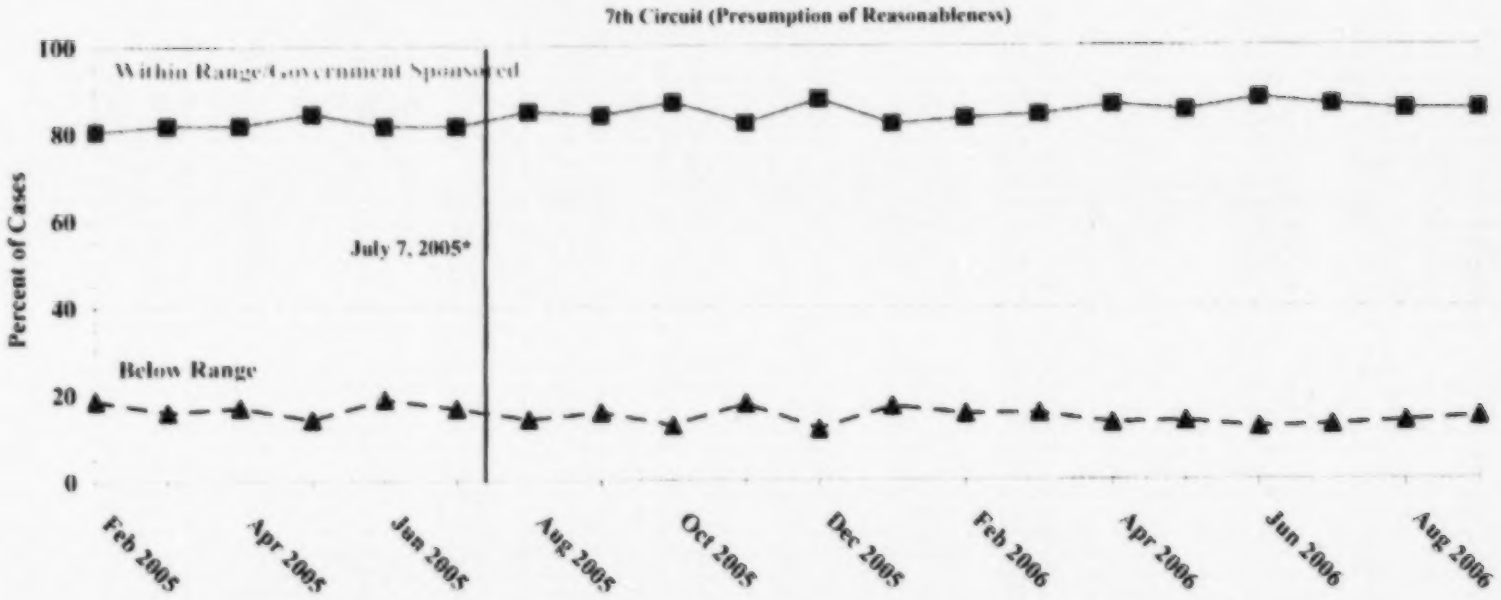

**United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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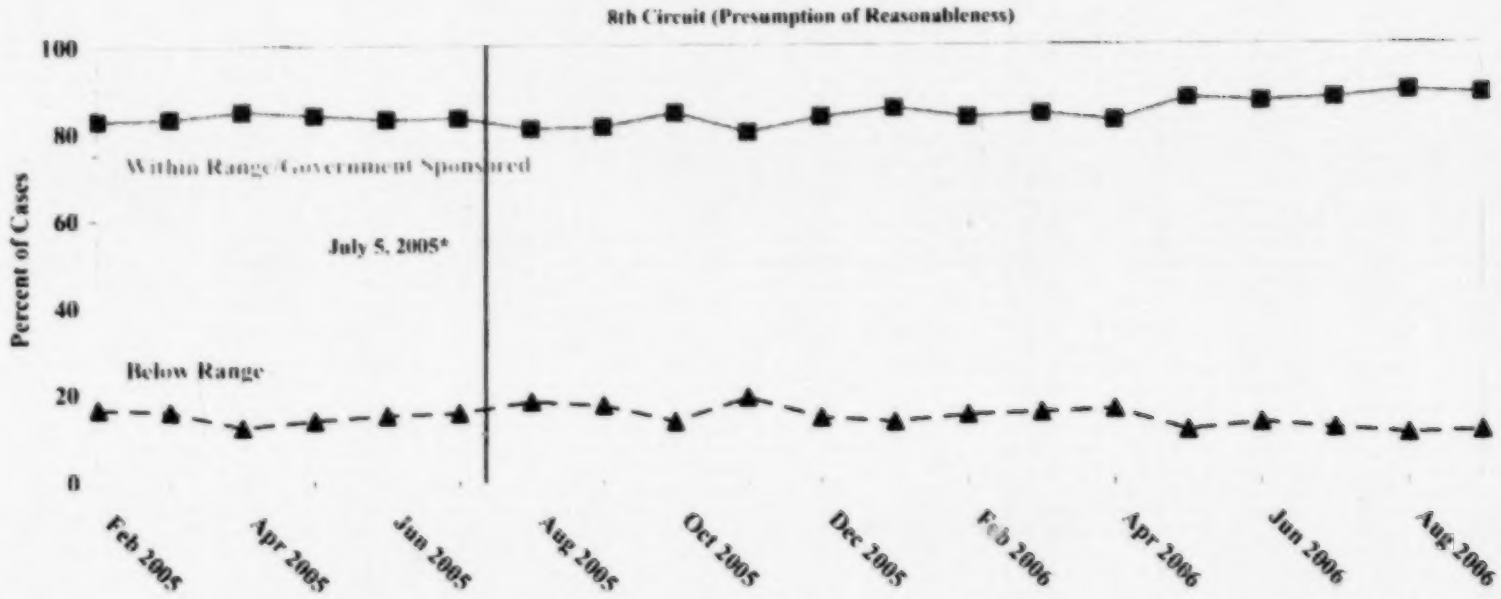

**United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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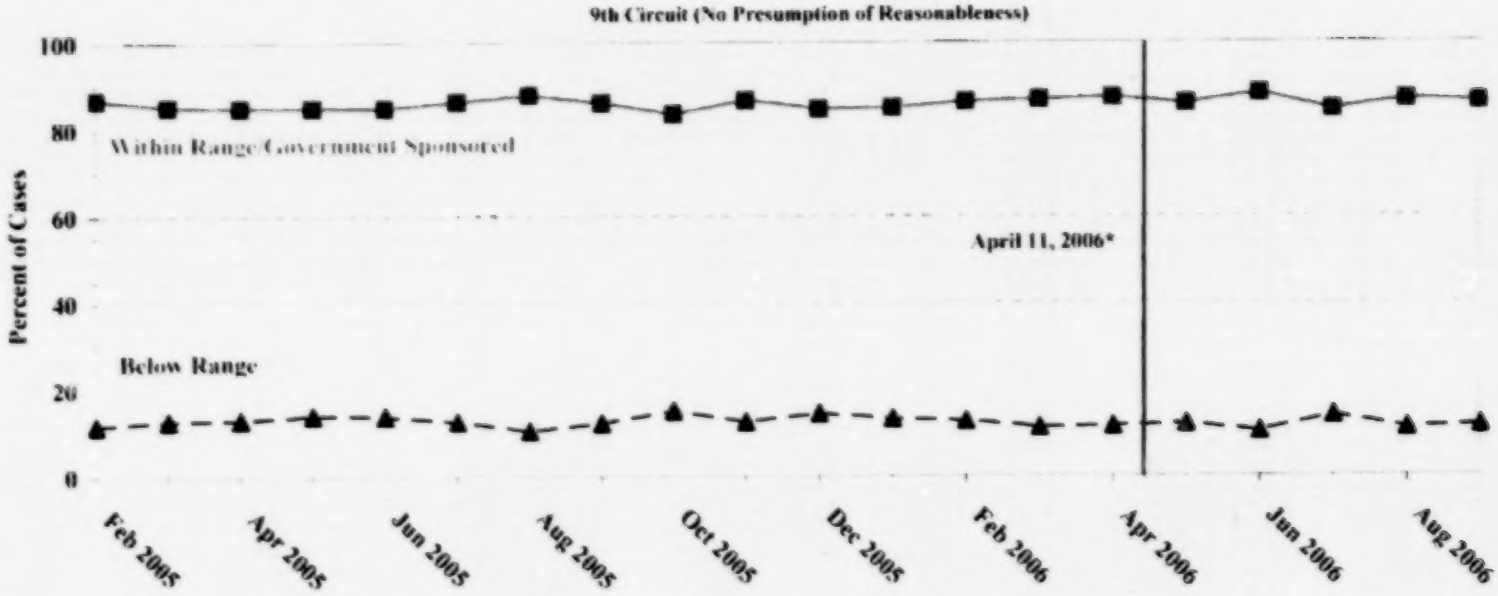

**United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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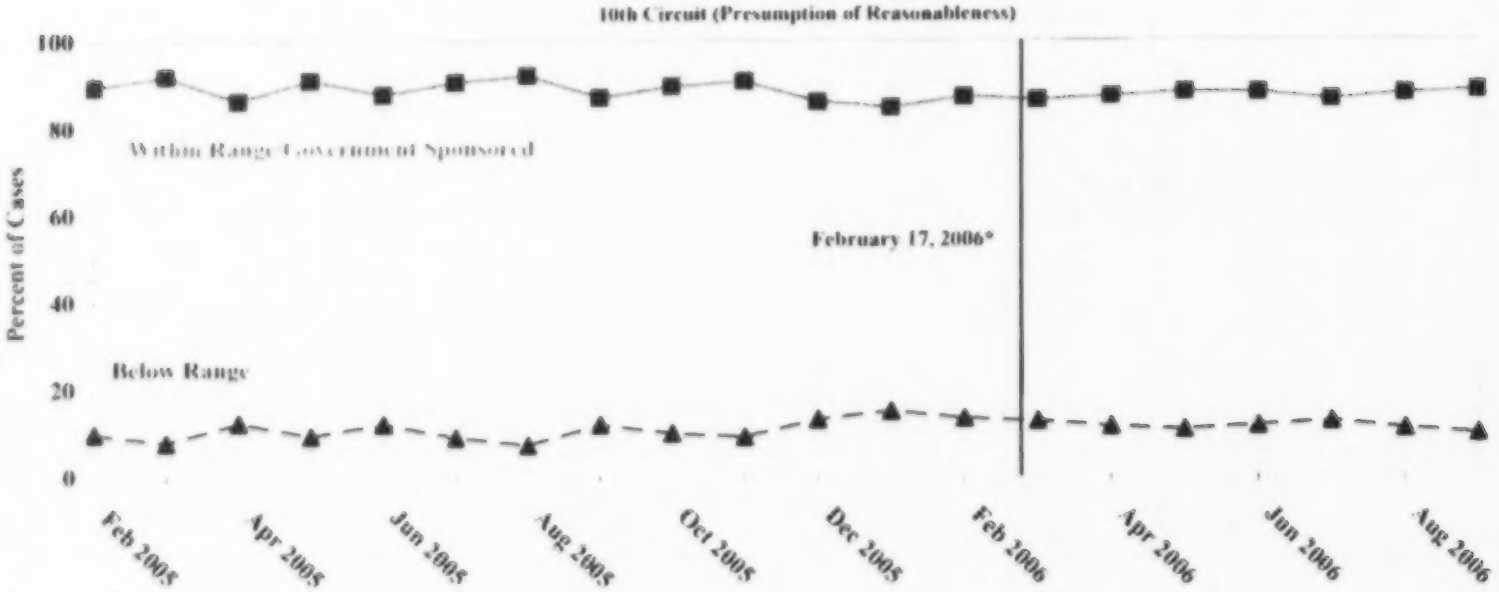

**United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

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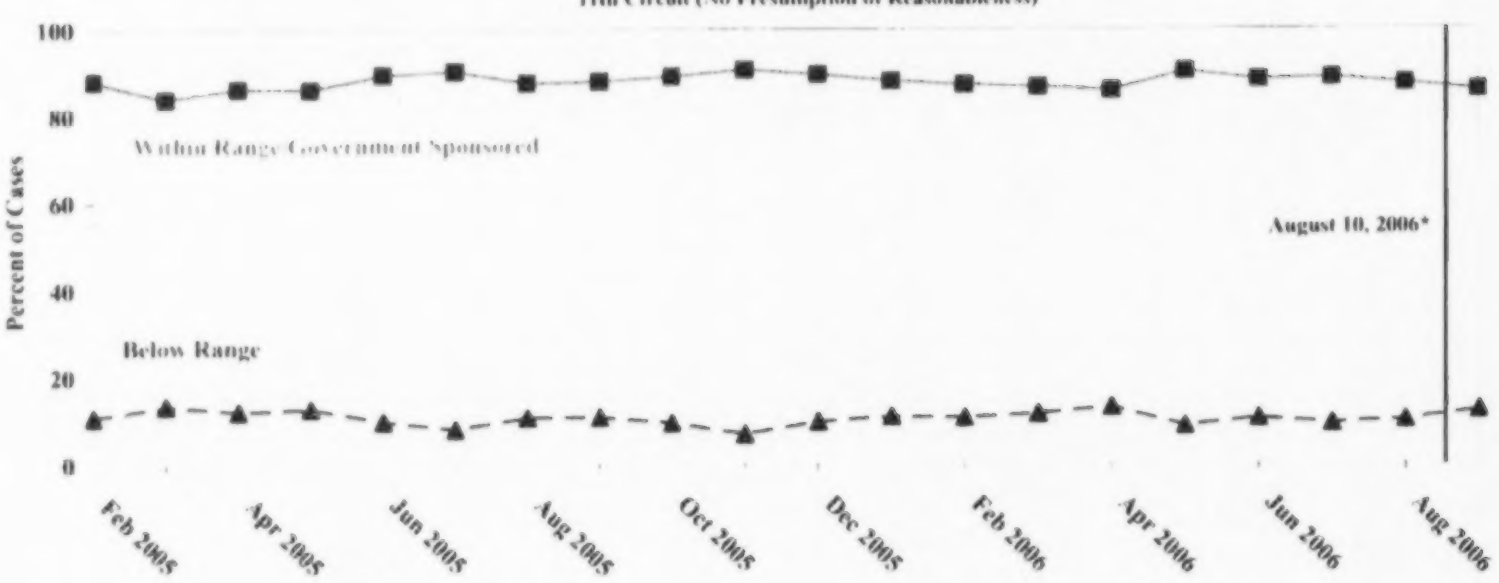

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SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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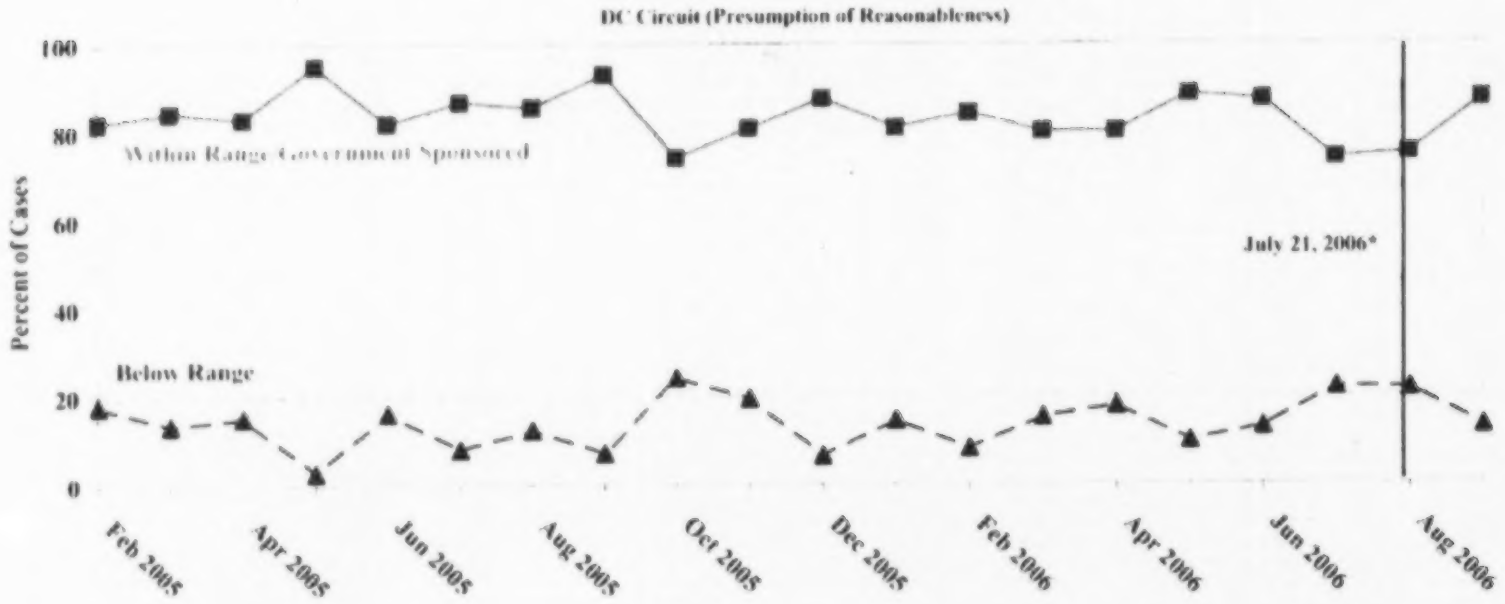

**United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

Methodology for Appendix

The charts in this appendix are based on data from all federal cases where the sentence was imposed from February 1, 2005, through September 30, 2006, and which was received, coded, and edited by the United States Sentencing Commission by November 27, 2006. It excludes data from cases where the sentence was above the applicable sentence range provided by the United States Sentencing Commission's *Guidelines Manual* or where the relationship between the sentence and the Guidelines range could not be determined due to missing information. Cases are divided into two groups: (1) cases where the sentence imposed was either within the Guidelines range or below the range but sponsored by the government, and (2) cases where the sentence was below the Guidelines range.

During this period, 12 of the United States Courts of Appeals rendered decisions as to whether sentences within the Guidelines range were presumed reasonable. As used in the appendices, the term "presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are presumed reasonable. The term "no presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are not presumed reasonable.

On chart 1, all sentences from a district court falling into the two categories discussed above are displayed by month. Data are grouped based on whether the court of appeals for the circuit to which a district court belongs decided that a sentence falling within the Guidelines range was presumptively reasonable. Cases are aggregated in this manner regardless of when the circuit court decision was issued during the period. For example, on July 21, 2006, the United States Court of Appeals for the District of Columbia held that the Guidelines were presumptively reasonable; therefore, all sentences from the

district court in that circuit that were below the Guidelines range are included in the group of cases represented on chart 1 on the line that is labeled "Below Range" and which contains the triangle symbol (which indicates a "presumption of reasonableness").

The remaining charts display the district court sentences by month over the period discussed above, sorted by the circuit to which the district court belongs. On these trend charts is a vertical line at the point where the court of appeals for that circuit issued its decision as to the presumptive reasonableness of sentences within the Guidelines range. Next to the line is the date of that decision.

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(8) (7)

Nos. 06-5618 and 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government, separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in an open and transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they mandate excessively harsh prison sentences, particularly with respect to minor regulatory infractions. In addition, WLF filed a brief in *United States v. Booker*, 543 U.S. 220 (2005) and

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than *amici* and their counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

in other Sentencing Guideline cases in lower courts, arguing that the Guidelines are unconstitutional, flawed, and generate unreasonably harsh sentences and aggravate disparity. *See, e.g., Thurston v. United States*, 358 F.3d 51 (1st Cir. 2004).

In addition, WLF's Legal Studies Division publishes relevant articles on criminal law and sentencing issues. *See, e.g.*, Brian M. Heberlig, *Avoiding Disparities Between Sentences Of Co-Defendants Is A Legitimate Sentencing Goal* (WLF Legal Opinion Letter, Apr. 7, 2006).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae* along with WLF in numerous cases, including *Booker* and *Thurston*.

INTRODUCTION AND SUMMARY OF ARGUMENT

"My object all sublime,
I shall achieve in time --
To let the punishment fit the crime --
The punishment fit the crime;"

Gilbert & Sullivan - The Mikado

Letting the "punishment fit the crime" has long been a sentencing policy goal in civilized societies. But this is only half of the equation, for the punishment must also fit the offender. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender,

as well as all the other sentencing factors specified in 18 U.S.C. § 3553(a).

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated, however, that the sentence ultimately imposed be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. *Id.* This so-called "parsimony principle" forbids a civilized society from inflicting gratuitous punishments on its citizens.

The Sentencing Reform Act of 1984 altered sentencing policy in two major ways. First, it abolished the parole system and established a determinate sentencing scheme. No longer would a convicted prisoner be eligible for parole, usually after serving one-third of the sentence originally imposed by the court. Second, the Act created the Sentencing Commission, which devised a set of rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

In order to comply with the harsh dictates of a Guideline sentence, courts would sometimes be forced to "stack" the sentences for multiple charges, making them consecutive instead of concurrent, in order to meet the Guideline result. In other cases, the Guideline sentence was so severe that it exceeded the statutory maximum sentence permitted, thereby requiring the court to lop off the end of the Guideline sentence to fit the statute's maximum term. This Procrustean approach to sentencing fundamentally altered the principle of letting the punishment fit the crime;

instead, the Guidelines effectively forced the crime to fit the punishment, aided and abetted by overzealous prosecutors engaged in questionable plea bargaining practices.

Just as Theseus eventually killed Procrustes, this Court struck down the mandatory feature of the Guidelines as unconstitutional under the Sixth Amendment in *United States v. Booker*, 543 U.S. 220 (2005). Henceforth, the Guidelines would be only one of several factors to be considered by a sentencing court in deciding what sentence to impose, keeping in mind Congress's overarching command to follow the parsimony principle. However, several courts of appeals have since attempted to resurrect the Guidelines by giving them a presumption of reasonableness that would effectively make them mandatory, and thus, inconsistent with *Booker* and the parsimony principle. The primary questions before the Court in this pair of cases are whether sentencing courts should regard a Guideline sentence as "presumptively reasonable," and if so, whether substantial variance from that sentence needs to be justified by extraordinary circumstances. *Amici* submit that the answers to both those questions are emphatically no.

The reason why the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation, as even the Commission itself has acknowledged. All of the sentencing factors of § 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. Under the Guidelines, no longer could judges fully consider a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, and the like, as they did prior to the promulgation of the Guidelines. The "one-size-fits-

all" approach of the Guidelines, which purportedly were designed to reduce unwarranted sentencing disparity, often caused more of it.

More significantly, the Guidelines are fundamentally flawed because they regularly dictate prison terms that are several times longer than terms actually served in the pre-Guideline era for the same offense. Because parole has been abolished, no longer will offenders be able to be released after serving one-third of their time. Thus, the Guidelines fly in the face of Congress's directive that they were to generally reflect the average sentence *actually served* in the pre-Guideline era. More importantly, the Guidelines directly violate Congress's directive, 28 U.S.C. § 994(j) -- that probation be the norm for non-violent first offenders -- by greatly reducing the availability of probation and other non-prison punishments for those categories of defendants. The Commission never adequately explained this radical departure from the pre-Guideline sentencing practice.

Therefore, in order to properly compare the length of pre- and post-Guideline sentences, any sentence imposed under the Guidelines should be multiplied by a factor of three in order to get a good sense of what that sentence would have been in a pre-Guideline era, thereby enabling one to gauge whether the Guideline generated sentence is a fair and reasonable one. For example, Petitioner Rita, a first-offender, father, and distinguished military veteran of two wars suffering from serious medical problems, was given a Guideline sentence of 33 months for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II replica rifle. Since he will be required to serve almost all of that time, his 33-month sentence is

comparable to a 99-month pre-Guideline sentence, or a little over eight years. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time (assuming he would not have received probation). It is hard to imagine that *any* judge in the pre-Guideline era would have sentenced Mr. Rita to prison for eight years. Mr. Rita's sentence is simply unreasonable by any standard.

Similarly, Petitioner Claiborne, also a first-offender, plead guilty to a very minor drug offense, and was given a below-Guidelines sentence of 15 months, which translates into a pre-Guideline sentence of 45 months, or almost 4 years. Yet the court of appeals declared this sentence too lenient, in light of the 37-month sentence called for by the Guidelines -- a sentence which translates into a pre-Guideline prison term of 111 months, or a little over 9 years. The district court's choice of a below-Guidelines sentence for Claiborne was clearly reasonable, and its reasons for imposing the sentence were valid ones that comported with the parsimony principle.

Accordingly, because of these systemic design flaws in the Guidelines and the results they have produced, they are hardly worthy of a presumption of reasonableness; if anything, the opposite is true. At most, they should be regarded as just one of several factors in § 3553(a) that a judge, using his or her informed discretion and judicial expertise, should consider, without giving the Guidelines any special or presumptive weight. Concomitantly, there should be no necessity of demonstrating extraordinary circumstances to justify imposing a lower sentence than the one called for by the Guidelines.

Finally, *amici* submit that sentencing courts should explain their reasons for imposing a sentence in order to

make it clear that they properly considered the sentencing factors in § 3553(a), thereby enabling a reviewing court to determine whether the sentence is reasonable both procedurally and substantively.

ARGUMENT

I. THE GUIDELINES DO NOT WARRANT A PRESUMPTION OF REASONABLENESS BECAUSE THEY ARE DESIGNED TO SYSTEMATICALLY GENERATE UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general] deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including the appropriate Sentencing

Guideline, 18 U.S.C. § 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, § 3553(a)(5).[2] *All* the factors listed must be considered by the Court; no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence carefully chosen that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in § 3553(a)(2).

One of the rationales for the Sentencing Reform Act of 1984 was the perception that judges' broad sentencing discretion resulted in a fragmented sentencing system that produced unwarranted disparity in sentences and a lack of fairness. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-3373.[3]

---

[2] The other four factors specified in 18 U.S.C. § 3553(a) that must be considered by the sentencing court are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (3) the kinds of sentences available;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

[3] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines apparently were minor or statistically insignificant and not based on impermissible factors such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111.

The Sentencing Reform Act abolished parole and established a determinate sentencing scheme whereby the sentence that was imposed was essentially the sentence served. Wholly independent of that reform, Congress also established the Sentencing Commission to promulgate Sentencing Guidelines that would effectively dictate the sentence, within a narrow range, to be imposed on a defendant convicted of a federal offense. 18 U.S.C. § 3553(b). In so doing, application of the Sentencing Guidelines under § 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in § 3553(a), even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle.

All of that changed when this Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights, and as a remedy, excised 18 U.S.C. § 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply one of seven factors a sentencing court must consider in fashioning a just sentence.

Contrary to the courts of appeals in these instant cases, *amici* submit that a Guideline sentence should not be given any "presumption of reasonableness" or any other special weight, because doing so would make the Guidelines effectively mandatory rather than advisory, contrary to *Booker*. Moreover, they should not be regarded as presumptively reasonable because the Guidelines themselves have structural design flaws that regularly produce harsh sentences in clear violation of the parsimony principle that the sentence "be sufficient, but not greater than necessary"

to serve the purposes of sentencing. Accordingly, there should be no need to show extraordinary circumstances when a judge imposes a below-Guideline sentence. All that is required is a statement of reasons explaining the sentence in light of the § 3553(a) factors.

A. The Guidelines Are Designed To Produce Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era.

The fundamental defect with the Guidelines is that they were drafted without hewing to Congressional commands. Congress intended that "for the most part the average time served [under the Guidelines] should be similar to that served today in like cases." S. Rep. No. 225, *supra*, at 116. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). In addition, Congress directed the Commission to develop the Guidelines to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).[4] Thanks to the flawed Guidelines, our nation's

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[4] The history of this provision suggests that prison was to be used for the principal purpose of incapacitation (specific deterrence) or retribution where the defendant would be a danger to the community if free to remain at large. 130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn). Attorney General Alberto Gonzales apparently shares this view, having opined during his confirmation hearings that incarceration is best suited "for people who commit

prisons are overpopulated by inmates serving sentences that far exceed the typical or average sentence imposed and served in the pre-Guideline era, including sentences by first offenders who have been convicted of non-violent and minor offenses.

The source material allegedly utilized by the Commission in determining past sentencing practices was a 1,279 page report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era, including the imposition of community service and fines, all of which properly reflect the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by § 3553(a)(3).[5] On the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders. This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores

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violent crimes and are career criminals." Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General, as transcribed by Federal News Service, *accessed at* http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc

[5] For example, convictions for the non-violent crime of mail or wire fraud resulted in probation sentences in 57.5 percent of the cases. *Id.* at 3-250, Table 3-58. Many of these probation sentences included fines, community service, and restitution. For those convicted for making a false statement within the jurisdiction of a federal agency who had no prior convictions, 76 percent were given probation. *Id.* at 3-222, Table 3-75.

can be easily increased by adding Specific Offense Characteristics that take probation off the table as a sentencing option.[6]

More significantly, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with inmates receiving their initial parole hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category 3 or less, the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20 (Parole Guideline chart attached hereto as App. 1a).[7] In short, even if Petitioner

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[6] According to a survey conducted by the Federal Judicial Center, 65.8 percent of the judges contacted indicated that the Guidelines do not appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997). In addition, 84.7 percent of the judges surveyed agreed that Congress should expand the so-called "safety valve" provision (18 U.S.C. § 3553(f) and USSG §5C1.2) so that *more* defendants would be eligible for sentence reductions under its provisions. *Id.* at 69. These views by experienced sentencing experts is further evidence of the structural design flaws of the Guidelines.

[7] For those crimes not listed in specific categories in the parole guidelines, the general rule is that for crimes where the maximum sentence is less than 2 years, the offense level is Category One; for statutes providing sentences from 2 to 3 years, the level is Category Two; and for sentences of 4 to 5 years, the level is Category Three. 28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses.

Rita had been sentenced to prison instead of probation in the pre-Guideline era, he likely would have been released after serving a minimal time of a few months since his offense would be no greater than a Category Three, and more likely a Category One.

Accordingly, sentences imposed under the Guidelines are roughly equivalent to pre-Guideline sentences that are *three times greater*. As previously noted, Petitioner Rita is a first-offender and distinguished military veteran who suffers from serious medical problems. He was sentenced to 33 months in prison for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II rifle. Since he will be required to serve almost all of that time (minus nominal good time credits), his 33-month sentence is comparable to a 99-month pre-Guideline sentence, or a little over eight *years*. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time. Surely, no judge would have sentenced Rita to prison for eight years in the pre-Guideline era. Rita's 33-month prison sentence is simply unreasonable by any standard. Similarly, Petitioner Claiborne's Guideline range was a prison sentence of 37 to 46 months. That sentence translates into a pre-Guideline prison term of 111 months to 138 months, or approximately 9 to 11 1/2 *years*. The district court imposed a much more reasonable below-Guideline sentence of 15 months, but even that translates into a very stiff 45-month pre-Guideline sentence. The court of appeals, giving the Guidelines presumptive weight, thought the lengthly sentence was too lenient.

Harsh sentences are thus common under the Guideline system and are unfairly imposed on those who

commit even minor regulatory offenses, particularly in the environmental area. In *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), for example, 97-month prison sentences were meted out to first offenders Robert Blandford and Abner Schoenwetter, hard-working seafood importers, and first offender Steven McNab, a Honduran seafood exporter, for the "crime" of violating the Lacey Act by importing frozen lobster tails from Honduras in clear plastic bags instead of cardboard boxes. This shipping practice violated an obscure Honduran regulation that the Honduran government argued was invalid and could not be enforced in its own country.

Those sentences translate into a mind-boggling pre-Guideline sentence of 297 months, or almost 25 years![8] In order to stretch the crime to make it fit the 97-month Guideline punishment (which was at the low end of the range), the sentencing court had to carve out a 37-month portion of a 60-month sentence from one of the charges, and stack it on top of a maximum 60-month sentence of another charge, and made them run consecutively, with the other counts running concurrently. *See* Blandford Pet. at 7; Pet. App. at 173a, No. 03-627, *cert. denied,* 540 U.S. 1177 (2004). Procrustes would have been happy.

These kinds of harsh sentences clearly violate the parsimony principle and every other sentencing factor in 18 U.S.C. § 3553(a), including the need "to promote respect for the law" as provided in § 3553(a)(2)(A). Neither the defendant nor society can have any "respect for the law" when the Guidelines mechanistically produce unduly harsh punishments. Indeed, the opposite is true; rigid Guideline

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[8] *See* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004).

sentences have been met with scorn and contempt by judges and the public alike.[9]

To be sure, Congress authorized the Sentencing Commission in 28 U.S.C. § 994(m) to depart from past sentencing practice if sentences were too lenient for serious crime, but Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added). It appears that the Commission did not follow 28 U.S.C. § 994(m) which mandates that the Commission "ascertain the average sentences imposed" and the "length of such terms *actually served*" before jettisoning pre-Guideline sentencing norms. The record, however, is sparse as to the Commission's articulated reasons for departing from past sentencing practice. This is particularly true for sentences meted out for environmental infractions where the pre-Guideline practice was probation, remediation, community service,

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[9] Federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 at 28 n.87 (collecting cases and other sources); *see also United States v. Green*, 346 F. Supp. 2d 259, 281 (D. Mass. 2004) ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . .").

and fines.[10] It appears that the Commission simply did not do all of its homework as required by Congress before sharply departing from past sentencing practice.[11]

When a statute clearly commands an agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. For example, in *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183 (D.C. Cir. 1990), the court was called upon to determine whether the EPA had properly followed Congressional directives in setting certain emission levels [compare to Guideline levels] and determining whether they were stringent enough [compare to the parsimony principle]. When it found the record to be barren, the court struck down the rule, stating, "We cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Id.* at 189 (emphasis added). *See also Chamber of Commerce v. Securities and Exchange Comm'n*, 412 F.3d 133 (D.C. Cir. 2005) (agency rule invalidated for not taking costs into

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[10] Where incarceration was imposed for minor environmental offenses in the pre-Guideline era, the length of the sentences were usually for a few weeks or months, coupled with fines and remediation, which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991) (summarizing disposition of all environmental criminal cases from fiscal years 1983 to 1991).

[11] *See also* Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers.

account as required by statute or considering alternatives). As this Court has stressed, courts must be sure that an agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

Here, the Guidelines are vulnerable from both a procedural and substantive challenge such as any other agency's rules. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, USSG §2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review of agnecy regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

Amici submit that no *Chevron* deference is due the Commission's Guidelines; at most, they deserve only *Skidmore*-type deference. *Skidmore v. Swift & Co.*, 323

U.S. 134, 140 (1944) (agency ruling, "while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of the such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). In short, the Guidelines are only to be considered as one of several sentencing factors, without any presumption of reasonableness, or any requirement that extraordinary circumstances must be shown to justify a sentence that departs downward from them.

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments In Violation of the Parsimony Principle.

Another major defect in the Guidelines is that in a number of cases, they require the sentencing judge to impose the statutory maximum sentence, despite all the other § 3553(a) factors counselling otherwise. This result clearly violates the parsimony provision, because the Guidelines call for a prison sentence greater than what Congress itself has declared should be the statutory maximum for the worst offender. Indeed, the Commission even contemplated that this bizarre result would occur by promulgating a specific application Guideline that would lop off any excess of the Guideline sentence that is greater than the statutory maximum. USSG §5G1.1(a).[12]

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[12] "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." USSG

A good case study of this troubling phenomenon is *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004). Mr. Thurston was charged with one count of conspiracy under 18 U.S.C. § 371 with respect to his company's medicare billing practice for laboratory blood testing. His co-defendant, who the district court found was the prime architect of the challenged practice, was offered a plea bargain that he accepted. He was allowed to plead nolo contendere, did not furnish any assistance to the government, and received three years of probation.

The government offered a similar plea deal to Thurston. Thurston rejected the offer because he believed he was innocent and committed no wrongdoing, and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing practice as a lawful industry practice. *Id.* at 60. There was no allegation or finding that Mr. Thurston financially benefited personally from the company's billing practice, unlike the allegations of fraud and personal enrichment made in Enron-type cases. Nevertheless, a jury found him guilty of one count of conspiracy as charged. The maximum sentence allowed by law is five years or 60 months. 18 U.S.C. § 371.

Although the government readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess had to be trimmed to fit the statutory maximum. The district court departed

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§5G1.1(a).

from the Guidelines, and imposed a reasonable split six-month term -- three-months to be served in prison and three months to be served by home detention -- followed by 21 more months of supervised release. The court did so in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant, and because of Thurston's civic and charitable works. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55.

The First Circuit reversed, finding that the then mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was impermissible." *Id.* at 78. Mr. Thurston would have to return to prison and serve the maximum five years (which is effectively a pre-Guideline sentence of 15 years). Thurston sought review in this Court, which summarily vacated the judgment and remanded following its *Booker* decision. 543 U.S. 1097 (2005).

On remand, a different sentencing judge[13] held a searching two-day hearing. At the conclusion, the court decided to impose the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence it imposed on Thurston was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). *See* Thurston Pet. App. at 188a, No. 06-378 (*cert. pending*). This sentence apparently outraged the prosecutors yet again and the government appealed Thurston's sentence for a second time.

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[13] The original judge recused himself from the case on remand, apparently due to his disgust for the harsh and inflexible Guidelines.

The First Circuit reviewed Thurston's sentence this time for reasonableness under the post-*Booker* voluntary guidelines and reversed Thurston's sentence again. The court of appeals held that the sentence was unreasonable, in part, because in the court's view, the Guidelines -- which called for a sentence that was much longer than the statutory maximum for a first offender --- is an "important consideration" for a sentencing court because it has the "imprimatur" of an allegedly "expert agency." 456 F.3d 211, 215 (1st Cir. 2006). The court of appeals reversed Mr. Thurston's sentence for a second time. It further held that any sentence imposed on remand that falls below a three-year prison term (an effective pre-Guideline sentence of *9 years*), would be unreasonably lenient and, presumably, would be reversed yet again. *Id.* at 220. Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years.[14] *Id.* Mr. Thurston's second petition for certiorari from that judgment is pending before this Court.

Congress provided that the maximum prison sentence for Thurston's crime should be five years in prison. Yet the Guidelines dictated a 78 to 97 month sentence for Thurston, a first-offender. Applying an uncapped Guideline sentence in that case would result in a sentence that would

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[14] Not only do the Guidelines dictate a patently harsh and unreasonable sentence, they run directly counter to Congress's direction to the Commission that "a term of imprisonment at or near the maximum term authorized for categories of defendants" be reserved for the class of thrice-convicted felons who have been convicted of crimes of violence and/or certain drug offenses. 28 U.S.C. § 994(h). Mr. Thurston, a pillar in this community, is a first-offender who was not convicted of a crime of violence or drug offense.

be approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case for the underlying object of the conspiracy. In short, the statutory *maximum* sentence that *could* be imposed, became the mandatory *minimum* sentence that were called for by the Guidelines.

The imposition of statutory maximums as mandatory minimums also occurs in certain environmental cases, particularly for those which are classified as misdemeanors, and hence, have a statutory maximum term of one year. Again, non-violent first offenders found guilty of a minor regulatory infraction find themselves sentenced to the statutory maximum prison term of one year because the unreasonable Guidelines call for a sentence even greater than that. *See* B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990). *See also United States v. Maul*, 2006 U.S. App. LEXIS 27979 (7th Cir. 2006) (defendant charged with a Class A misdemeanor for merely "struggl[ing] with two federal officers" as they were arresting him pleaded guilty and received the statutory maximum sentence of one year because Guidelines would require a 30-37 month sentence due to his criminal history score, and because a guideline sentence is "presumptively reasonable").

C. The Guidelines Are Flawed Because They Spawn, Rather Than Reduce, Sentencing Disparities.

One of the primary purposes of the Guidelines was to reduce perceived unwarranted disparity in sentencing. As one commentator noted:

> Of all the problems that inspired Congress to establish guidelines, none was as urgent as inconsistency in sentencing. 18 U.S.C. 3553(a)(6) lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the primary sentencing considerations. The guidelines reflect this commitment in the opening policy statement. The goal of uniformity is no less pressing simply because two defendants happen to be joined in the same case. *In fact, similarly situated defendants accused of the same crime so clearly deserve similar punishments that they present test cases for the legitimacy of the guidelines.*[15]

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Sent. R. 116 (1993) *available at* 1993 WL 561438 (footnote omitted) (emphasis

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[15] As the Sentencing Commission itself recognized:

> *The guidelines seek fairness*, which is the establishment of sanctions proportionate to the severity of the crime and *the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders*.
>
> * * * *
>
> Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public.

U.S. Sentencing Comm'n, 2002 ANNUAL REPORT 1 (emphasis added). Indeed, an empirical study of pre- and post-Guideline sentences conducted by the Department of Justice's Bureau of Justice Statistics suggests that disparities in sentencing of different racial or ethnic groups may have *increased* under the Guidelines. Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 124 (1998).

added).

If the reduction of sentencing disparities of defendants accused of the same crime present the "test case" to assess the legitimacy of the Guidelines, they clearly flunk that test. The previously discussed *Thurston* case is also Exhibit A in demonstrating the failure of the Guidelines to reduce disparity. As noted, both defendants were charged with the same offense for essentially the same conduct. If anything, Thurston's co-defendant was *more* culpable. But because Thurston exercised his constitutional right to trial, his Guideline sentence was the statutory maximum of five years, whereas his co-defendant received probation.

In *Thurston*, the government argued that departures from the guidelines on the basis of sentencing disparity are only justified based on *nationwide* disparities, rather than intra-case or co-defendant disparities. This argument is absurd on its face, for it tolerates gross disparities in the very same case for the very same conduct, and thus, contravenes one of the primary reasons for having the Guidelines in the first place.

In addition, *amici* note that many courts and commentators have expressed serious misgivings about the Guidelines' inflexibility in the pre-*Booker* era for dealing with unwarranted disparities in sentences. *See* James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2347 (1998).[16] Departing from the Guidelines in cases such as this not only would further Congress's intent of reducing disparities, but also would

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[16] See also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681, 1723-24 (1992).

bring transparency into the sentencing process which will promote public confidence in the integrity of the judicial system.

> Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are -- or are not -- served by the current structure of the Guidelines.

Id. at 2350. Those salutary public policy goals can now be fully realized in the post-*Booker* era, provided that the Guidelines are not given a "presumption of reasonableness." *See, e.g., United States v. Lazenby*, 439 F.3d 934 (8th Cir. 2006) ("district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators. . . . [E]xtreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), but it also suggests an arbitrary level of decision-making that fails to 'promote respect for the law,' § 3553(a)(2)(A).").

D. The Guidelines Are Flawed Because They Do Not Properly Provide for Probation And Violate Congress's Command To Reduce The Likelihood of Prison Overcrowding.

The Guidelines are also flawed and are unworthy of a presumption of reasonableness because the Sentencing Commission violated the Congressional directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity

of the Federal prisons . . . ." 28 U.S.C. § 994(g). In fact, the Guidelines appear to have been formulated to *maximize* the likelihood that the prison population would exceed the capacity of federal prisons. Because the flawed Guidelines routinely generate unduly harsh prison sentences, federal prison population has far exceeded its capacity by over 40 percent. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7.

One of the sentencing factors that courts are required to consider is the "kind of sentences available," § 3553(a)(3). In addition to incarceration, for which the Guidelines are heavily skewed, there are a variety of sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate)[17]; halfway houses, community service, restitution, forfeiture, and monetary fines, or a sentencing package involving a mixture of all these sanctions.

Unfortunately, many of these sentencing options are unavailable in many Guideline cases, even though a suspended sentence with probation comports with the parsimony provision. Violations of any of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution, and community service) will trigger probation revocation proceedings, and if warranted, incarceration will follow. On the other hand, errors for imposing excessive prison terms in violation of the parsimony provision cannot

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[17] For a good description of the costs and benefits of home confinement, see Paul J. Hofer and Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987).

be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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APPENDIX

GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense Characteristics:	Offender characteristics: Parole prognosis (salient factor score 1998)			
	Very good	Good	Fair	Poor
Severity of offense behavior	**(10 to 8)**	**(7 to 6)**	**(5 to 4)**	**(3 to 0)**
	Guideline range (months)			
Category:				
1	[</=]=4	[</=]=8	8-12	12-16
2	[</=]=6	[</=]=10	12-16	16-22
3	[</=]=10	12-16	18-24	24-32
4	12-18	20-26	26-34	34-44
5	24-36	36-48	48-60	60-72
6	40-52	52-64	64-78	78-100
7	52-80	64-92	78-110	100-148
8	100+	120+	150+	180+

Source: 28 C.F.R. 2.20 Paroling policy guidelines (footnote omitted)

(22)

No. 06-5754

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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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MISCELLANEOUS

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U.S. Const. art. II, § 3 1

Pursuant to Rule 44.1, Victor A. Rita, Jr., respectfully petitions for rehearing of the Court's decision in his case rendered June 21, 2007.

GROUNDS FOR REHEARING

Petitioner recognizes that rehearing is an extraordinary remedy, but respectfully submits that it is warranted in this case because of the diametrically opposed positions taken by the Executive Branch in two criminal cases of national import: Mr. Rita's case and the case of *United States v. I. Lewis Libby*, Criminal No. 05-394 (RBW) (D.D.C.).Further, rehearing would be the appropriate mechanism, in light of the President's rationale underlying his commutation of I. Lewis Libby's sentence, for the Court to reconsider its remedial decision in *United States v. Booker*, 543 U.S. 220 (2005).

I. THE CONSTITUTION REQUIRES EXECUTIVE BRANCH EVENHANDEDNESS IN THE EXECUTION OF THE LAWS

The relevant parts of the Constitution governing the powers of the Executive Branch at issue here are as follows.

> Section 1. The executive Power shall be vested in a President of the United States of America.
>
> * * * *
>
> Section 3. He shall ... take Care that the Laws be faithfully executed[.]

U.S. Const. art. II, §§ 1,3.

As the Chief Executive, the President is at the country's helm, tasked with faithfully executing the laws passed by Congress. He and his subordinates are the ones who argue their application before the Judiciary, as this case exemplifies. As the Court noted eighty years ago:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws.

> But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Myers v. United States, 272 U.S. 52, 117 (1926) (internal citations omitted). A third implication flows from the Court's decision in *Myers*: The President and his subordinates must act with uniformity when executing the laws.

The recent statement[1] by the President, released in conjunction with his commutation of Mr. Libby's sentence, directly conflicts with the federal sentencing policy espoused by the Administration[2] and argued vehemently, indeed successfully, by the Executive's own Solicitor General in this case.

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[1] July 2, 2007, Statement by the President on Executive Clemency for Lewis Libby, *available at,* http://www.whitehouse.gov/news/releases-/2007/07/20070702-3.html (herein "Statement"). Epitomizing the many ironies between the *Libby* case and the *Rita* case, July 2, 2007, the day Mr. Libby's sentence was commuted, also was the same day Mr. Rita had to report to the Bureau of Prisons to begin the service of his sentence.

[2] June 1, 2007, Prepared Remarks of Attorney General Alberto R. Gonzales, available at, http://www.usdoj.gov/ag/speeches/2007/ag_-speech_070601.html (calling for the passage of legislation to "restore the binding nature of the sentencing guidelines so that the bottom of the recommended sentencing range would be a minimum for judges, not merely a suggestion[.]").

Ironically, the President set forth in the Statement his conclusion that the district court in the *Libby* case rejected "the consideration of factors that could have led to a sentence of home confinement or probation."[3] This was the precise, nearly verbatim, argument made by the Petitioner[4] in this case and opposed by the President's subordinate, his Solicitor General.[5]

A short comparison of this case with Mr. Libby's discloses the striking similarities between the two despite their disparate results. To begin, neither man was the target of the investigation for which he was ultimately charged. In North Carolina, the U.S. Attorney's Office began an investigation of a North Carolina firearms company to determine whether it was violating the federal firearms laws.[6] In the process of this investigation, witnesses, including Mr. Rita, were brought before the grand jury to testify. In Washington, D.C., a Special Prosecutor was appointed to investigate the leaking of Valerie Wilson's name to columnist Robert Novak to learn whether any person violated either the Intelligence Identities Protection Act or the Espionage Act. In the process of this investigation, witnesses, including Mr. Libby, were brought

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[3] Statement ¶ 8.

[4] "Properly considering all of the facts, there was no need for a custodial punishment. A term of probation, or other alternative to incarceration such as house arrest, would have amply satisfied the needs to 'reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.' 3553(a)(2)(A)." Pet. Br. at 23.

[5] "[I]t would be a rare case in which the Guidelines range is not within the broad range of reasonableness, and it would be a rarer case in which the bottom of the Guidelines range is not within that range. This is not such a case." Gov. Br. at 50 (internal citation and quotation marks omitted). It should be noted that both Mr. Rita and Mr. Libby received a sentence at the bottom of their respective Guidelines ranges.

[6] (J.A. 7). Citations to the record filed in this case and contained in the Joint Appendix are referenced as (J.A.).

before the grand jury to testify. Both men – Rita and Libby -- were federally indicted on two counts of making false statements under oath, two counts of perjury, and one count of obstruction of justice. Both were convicted by a jury. Both men were sentenced at the low end of their respective Guidelines ranges: Mr. Rita for 33 months and Mr. Libby for 30 months. Both men have extensive civil service backgrounds and are dedicated family men. Significantly, both men have been subjected to what the President noted in Mr. Libby's case as "a harsh sentence based in part on allegations never presented to the jury [,]"[7] something the Court has labeled *Apprendi*[8] error.[9] Despite all of these similarities, today Mr. Rita is in prison and Mr. Libby is not.

The President granted executive clemency to Mr. Libby after his convictions for perjury and obstruction of justice because the President believed that the 30 month sentence imposed was "excessive."[10] The President stated

> My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained through his years of public service and professional work in the legal community is forever damaged. His wife and young children have also suffered immensely. He will remain on probation. The significant fines imposed by the judge will remain in effect. The consequences of his felony conviction on his former life as a lawyer, public servant, and private citizen will be long lasting.[11]

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[7] Statement ¶ 5.

[8] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[9] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 227-8 (citations omitted).

[10] Statement ¶ 9.

[11] Statement ¶10.

The President cited critics who "have made important points" that "the punishment does not fit the crime: Mr. Libby was a first-time offender with years of exceptional public service and was handed a harsh sentence based in part on allegations never presented to the jury."[12] Petitioner raised those very same "important points" in arguing that his 33-month sentence for the same offenses was excessive, but was opposed by the Executive Branch every step of way. The facts in Petitioner's case are far more compelling than those cited by the President in commuting Mr. Libby's sentence.

As set forth in his Brief, Petitioner identified significant grounds for his request for a sentence below the guideline range, including his military service, his civil service, and his physical impairments.[13]

For 24 years, Mr. Rita served in the United States Marine Corps, the United States Army, and the United States Army Reserve. His service included tours of duty in the Vietnam and Gulf Wars, and he has received more than 35 awards and medals for distinguished conduct.[14] His service to his country resulted in serious physical ailments. He was exposed to Agent Orange during the Vietnam War, which continues to produce skin rashes and infections that require perpetual care. He has diabetes, which causes periodic numbness in the feet as well as memory and eyesight loss. He suffers from arthritis, an enlarged prostate, acid reflux, a herniated disk, and sleep apnea.[15] To treat these conditions, Mr. Rita - who is 59 years old - requires a long list of prescription medications.

Since Mr. Rita's sentencing, his health has continued to deteriorate, which is another reason that it is appropriate for the reasonableness of his sentence be revisited. Up until his

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[12] Statement ¶ 5.

[13] (J.A. 40-47, 64-65).

[14] (J.A. 65).

[15] (J.A. 68-73).

incarceration, the Department of Veterans Affairs continued to treat Petitioner for Post-Traumatic Stress Disorder (PTSD). His doctor noted that although Mr. Rita is compliant with his treatment and medication, "[h] is symptoms continue to worsen including severe depression, anhedonia, and lack of concentration."[16] Before reporting to the BOP, Petitioner participated in bi-monthly group therapy with other Vietnam veterans."While he does report having benefitted from the supportive context of his therapy group, he continues to report significant PTSD symptoms, including intrusive memories, nightmares, disrupted sleep patterns, poor concentration, and irritability. It is believed that his chronic PTSD condition has interfered and continues to interfere significantly with his ability to function in both social and occupational settings."[17] Finally, the Department of Veteran's Affairs recently found Petitioner "totally and permanently unemployable" at any job due to the extent of his multiple conditions.[18]

Like Mr. Libby, Mr. Rita had no criminal history points under the Guidelines and he was handed a harsh sentence based in part on a cross-reference under the Guidelines to an offense that was unsupported by the jury determination. Unlike Mr. Libby, he has over 24 years of service in the military, a service that has left him so disabled as to be totally and permanently unemployable.

The Solicitor General argued before this Court that Petitioner's 33 month sentence was reasonable. The Solicitor General argued that Mr. Rita's personal characteristics were not nearly sufficient to rebut the presumption that a within-Guidelines sentence is reasonable. The Solicitor General argued that "one of the things [a judge] is required to do under

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[16] Letter of Aitala Giron, M.D., attached as Exhibit 1.

[17] Letter of Pam Slone, Ph.D., attached as Exhibit 2.

[18] Letter of Ronald B. Tolchin, D.O., attached as Exhibit 3.

section 3553(a) is to consider the need to avoid unwarranted disparity between defendants who have been convicted of similar criminal conduct and have similar records."[19] The Solicitor General further noted that "we are in a Federal system with 674 Federal district judges, and we cannot have all our own personal guidelines systems."[20] Finally, the Solicitor General used as an example of an unreasonable sentence one where the judge "takes a guideline range like this one, of 33 months to 41 months, and the judge says in my view military service means that this defendant gets probation."[21]

Although it is arguable[22] that the *Libby* case presents less of a sympathetic basis for a non-custodial sentence than Petitioner's case, the Executive determined that one day of prison time was too much for Mr. Libby. That position is entirely inconsistent with a statement that "it would be a rarer case in which the bottom of the Guidelines range is not within that range [of reasonableness]."[23] With his sentenced commuted, Mr. Libby essentially has received probation, a sentence that the Solicitor General argued would be unreasonable in Mr. Rita's case.[24]

Clearly, the Executive Branch has taken inconsistent positions in different cases, an inconsistency that cannot be supported by factual differences but rather stems from an unjustified policy difference in executing the federal sentencing

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[19] February 20, 2007, oral argument of Deputy Solicitor General Michael Dreeben, *Rita v. United States*, No. 06-5754, Oral Arg. Trans. at 37.

[20] *Id.*

[21] *Id.*, at 38.

[22] *See generally* "What Was Bush Thinking" *available at* http://www.washingtonpost.com/wpdyn/content/blog/2007/07/05/BL2007070500940pf.html

[23] Gov. Br. at 50 (internal citation and quotation marks omitted).

[24] *Rita v. United States*, No. 06-5754, Oral Arg. Trans. at 38.

Guidelines in similar cases. The latest move by the executive Branch reflects a policy change that a sentence under a properly calculated Guideline range is excessive and cannot be deemed reasonable, let alone presumptively reasonable.

Asserting a new policy in one case within weeks of asserting a totally contrary policy in another case raises issues related to the doctrine of judicial estoppel. "The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) (quoted in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). The purpose of judicial estoppel is "to protect the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[25]

Several factors help determine whether the doctrine should be applied. "First, a party's later position must be 'clearly inconsistent' with its earlier position."[26] The second consideration is whether the party prevailed in its early position "so that judicial acceptance of an inconsistent position in a later preceding would create 'the perception that either the first or the second court was misled.' "[27] A third consideration is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[28] The Court noted that "[i] n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional

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[25] 532 U.S. at 749-50 (internal quotation marks and citations omitted).

[26] *Id.*

[27] *Id.* (internal citation omitted).

[28] *Id.*, at 751.

considerations may inform the doctrine's application in specific factual contexts."[29]

In this case, the Executive Branch has adopted a new position regarding sentencing that is clearly inconsistent with its earlier position, a position that was adopted by this Court in *Rita* at the behest of the Executive. Although it is not a typical judicial estoppel case, the doctrine is applicable under these circumstances because the Executive is taking inconsistent stances in substantially similar cases. The result is a wide-spread perception of unfairness that undermines the nation's trust in the criminal justice system. That distorted perception calls for an equitable remedy.

To remedy this perception, the Court should at least reconsider its majority opinion, vacate Petitioner's sentence, and remand the case to the sentencing court for further consideration in light of the President's revised position on "excessive" sentences. Because the President identified, and arguably embraced, the Court's evolving Sixth Amendment jurisprudence, noting that Mr. Libby "was handed a harsh sentence based in part on allegations never presented to the jury [,]" the Court should reconsider its remedial decision in *Booker* as well.

II. THE COURT SHOULD RECONSIDER ITS REMEDIAL OPINION IN *UNITED STATES v. BOOKER*

Ironically, in *Rita*, the Executive Branch argued that the uniformity and consistency provided by the Guidelines was of supreme importance and a sentence within that range is presumptively reasonable. In *Libby*, the Executive Branch was unconcerned by consistency or uniformity, focusing instead upon the excessiveness of the sentence determined in large measure by the irrelevance of Mr. Libby's background and personal characteristics under the Guidelines, and that facts

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[29] *Id.*

never submitted to the jury nor proven beyond a reasonable doubt were used to increase Mr. Libby's punishment. In short, the Executive Branch took notice of the Guidelines' continued Sixth Amendment violation.

Beginning with *Jones v. United States*, 526 U.S. 227 (1999), the Court examined the Sixth Amendment's history and recognized that judicial factfinding operating to increase a defendant's otherwise maximum punishment posed a grave constitutional question. Invoking the doctrine of constitutional avoidance, the Court interpreted the statute at issue in *Jones* to skirt the constitutional problem. Shortly over one year later, the Court had no choice but to address the constitutional issue head-on in *Apprendi*. The Court held that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[30] Again and again, the Court has reaffirmed the rule of *Apprendi*, applying it to facts subjecting a defendant to the death penalty,[31] to facts permitting a sentence in excess of the standard range under the State of Washington's sentencing laws,[32] to facts triggering a sentencing enhancement under the federal Guidelines,[33] and to facts permitting movement to a more severe sentencing triad under the State of California's sentencing laws.[34]

In all of the Court's Sixth Amendment decisions since *Jones*, except one, it applied the *Apprendi* rule and it invalidated the offending legislation, less the legislation be construed to conform to apply to the espoused Sixth Amendment protections. The one exception was the remedial decision in

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[30] 530 U.S. at 490.31

[31] *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002).

[32] *Blakely v. Washington*, 542 U.S. 296, 304-305 (2004).

[33] *Booker*, 543 U.S. at 243-244.

[34] *Cunningham v. California*, 127 S. Ct. 856, 871 (2007).

Booker. Although the Court excised portions of the Sentencing Reform Act in an effort at Sixth Amendment compliance instead of *Blakely*-izing the Guidelines, Justice Scalia accused the Court of judicial legislation.[35] That "reasonableness" review has wrought disparate treatment under the Guidelines since *Booker* is beyond dispute. "As should be clear from our need to decide the case today, however, precisely what 'reasonableness' review entails is not dictated by *Booker*."[36]

As can be gleaned from the opinions filed in Petitioner's case, five members of the Court still recognize the viability of an as-applied Sixth Amendment violation under the Guidelines: "Moreover, even if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet to be defined judicial standard of reasonableness, Justice Scalia correctly acknowledges this case does not present such a problem."[37] "[M] y position is that there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts. *Booker* itself reveals why that reality dooms the construct of reasonableness review established and applied by today's opinion.[38] "I would therefore reject the presumption of reasonableness adopted in this case, not because it is pernicious in and of itself, but because I do not think we can recognize such a

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[35] *Booker*, 543 U.S. at 310 (Scalia, J., dissenting) ("The Court's need to supplement the text that remains after severance suggests that it is engaged in 'redraft[ing] the statute' rather than just implementing the valid portions of it.") (citations omitted).

[36] *Rita v. United States*, No. 06-5754, Slip Op. at 2 (Scalia, J., concurring).

[37] *Rita v. United States*, No. 06-5754, Slip Op. at 6 (Stevens with whom Ginsburg, JJ., joins concurring).

[38] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Scalia with whom Thomas, JJ., joins concurring).

presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee.[39]

With the President's appellation of "excessive" to describe Mr. Libby's low-end Guideline sentence, together with his observation that judge-found facts were employed to reach an unusually harsh 30 month result, the Court should accept the President's conclusions as an invitation to revisit its remedial decision in *Booker*. "The upshot is that today's decision moves the threat to the practical value of the Sixth Amendment jury right closer to what it was when this Court flagged it in *Jones*, and it seems fair to ask just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases."[40] Likewise, it seems equally fair to ask just what will be accomplished in real terms by the judicial labor yet to be expended in *Gall*[41] and *Kimbrough*?[42] Will the Sixth Amendment jury right flagged by the Court in *Jones* be further obfuscated?

CONCLUSION

The Court should grant rehearing in this case because of the diametrically opposed positions taken by the Executive Branch in this case and the *Libby* case. Further, rehearing would be the appropriate mechanism, in light of the Executive Branch's rationale and policy change underlying the commutation of Mr. Libby's sentence, for the Court to reconsider its remedial decision in *Booker*.

Respectfully submitted this the 16th day of July, 2007.

/s/ Thomas N. Cochran
THOMAS N. COCHRAN
Counsel of Record for Petitioner

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[39] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Souter, J., dissenting).

[40] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Souter, J., dissenting).

[41] *Gall v. United States*, No. 06-7949, cert. granted, June 11, 2007.

[42] *Kimbrough v. United States*, No. 06-6330, cert. granted, June 11, 2007.

Assistant Federal Public Defender
301 North Elm Street, Suite 410
Greensboro, North Carolina 27401
Telephone: (336) 333-5455

APPENDIX

APPENDIX A

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

Mr. B. C. Gibbard
Veterans Service Center Manager
Regional Office
P.0 Box 1437
Department of Veterans Affairs
St. Petersburg, Florida 33731

Rita. Victor
SSN:

Dear Sir:

This is to verify that Mr. Rita is diagnosed with and being treated for chronic Post-Traumatic Stress Disorder at the Department of Veterans Affairs Medical Center. Mr. Rita is followed at the PCT clinic on a regular basis for medication follow up and group therapy. He has been compliant and an active participant in treatment. Also. he recently completed a 14 week Residential Treatment.

Mr. Rita continues to have serious residual symptomatology even though he is complaint with his treatment and medication. His symptoms continue to worsen including severe depression, anhedonia, and lack of concentration. He has severe difficulties with sleep, frequently waking up during the night. nightmares. severe isolation and avoidance. He has recurrent intrusive thoughts distressing in nature and severe difficulties with irritability and labile affect. Symptoms are consistent with a diagnosis of chronic PTSD. It is felt that his chronic PTSD has interfered significantly with his ability to function in a social and occupational role.

Prognosis guarded.

Should you require additional information, please do not hesitate to contact the undersigned at (305) 324-4457. ext. 3813.

Sincerely

/s/ Aitala Giron,
Aitala Giron, M.D.
Staff Psychiatrist
Post Traumatic Stress
Disorder Clinic

APPENDIX B

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

April 19, 2007

Department of Veterans Affairs
Regional Office
ATTN: Adjudication Officer
PO Box 1437
St. Petersburg, FL 33731
RE: Victor A. Rita, Jr. SS

Dear Sir or Madam.

This is to verify that Mr. Victor A. Rita has been diagnosed with arid continues to be treated for chronic Post-Traumatic Stress Disorder (PTSD) in our Post-Traumatic Stress Clinical Team (PCT) outpatient clinic, at the Department of Veterans Affairs Medical Center in Miami. Florida.

Mr. Rita was admitted into PCT in November 2005, subsequent to an evaluation and diagnosis of PTSD. He currently participates in hi-monthly group therapy with other Vietnam veterans. He also receives medication management to assist with sleep difficulties and his depressed mood. Re is prescribed Sertraline 100 mg and Amitriptyline 50 mg. Fie has demonstrated good attendance and high motivation with regards to treatment and is compliant with his treatment plan. While he does report having benefitted from the supportive context of his therapy group, he continues to report significant PTSD symptoms, including intrusive memories. nightmares, disrupted sleep patterns. poor concentration, and irritability. It is believed that his chronic PTSD condition has interfered and continues to interfere significantly with his ability to function in both social and occupational settings.

Should you require additional information. please do not hesitate to contact the undersigned at (305) 324-4435 extension 3813.

Sincerly,

/s/ Pam Slone Ph.D
Pam Slone Ph.D.
Licensed Psychologist PCT Clinic

APPENDIX C

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

Mr. B.T. Gibbard
Veterans Service Center Manager
Regional Office
P.O. Box 1437
Department of Veterans Affairs
St. Petersburg FL. 33731

April 20, 2007

Re: Victor Rita
SS #

Mr. Victor Rita has been under my care for chronic intractable pain of multifactorial etiology. These include cervical spinal stenosis with mild to moderate cord compression., a R rotator cuff tear with impingement, and neurogenic pain related to a diabetic neuropathy. As a result of this he is on analgesics muscle relaxants and sleep aids. In addition to this he is unable to drive due to the multiple medications. He also suffers from PTSD and is under the treatment of Dr. Giron for this. He is service connected for the above conditions.

In light of the multiple conditions, it is my feeling that he is totally and permanently unemployable. If you should need any additional information related to the above do not hesitate to call 305-324-4455 ext. 3080.

Respectfully

/s/ Ronald B. Tolchin D.O.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/Thomas N. Cochran
THOMAS N. COCHRAN
Counsel for Petitioner